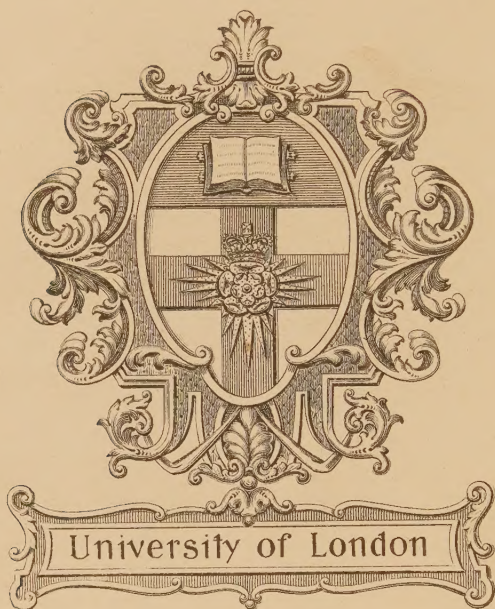


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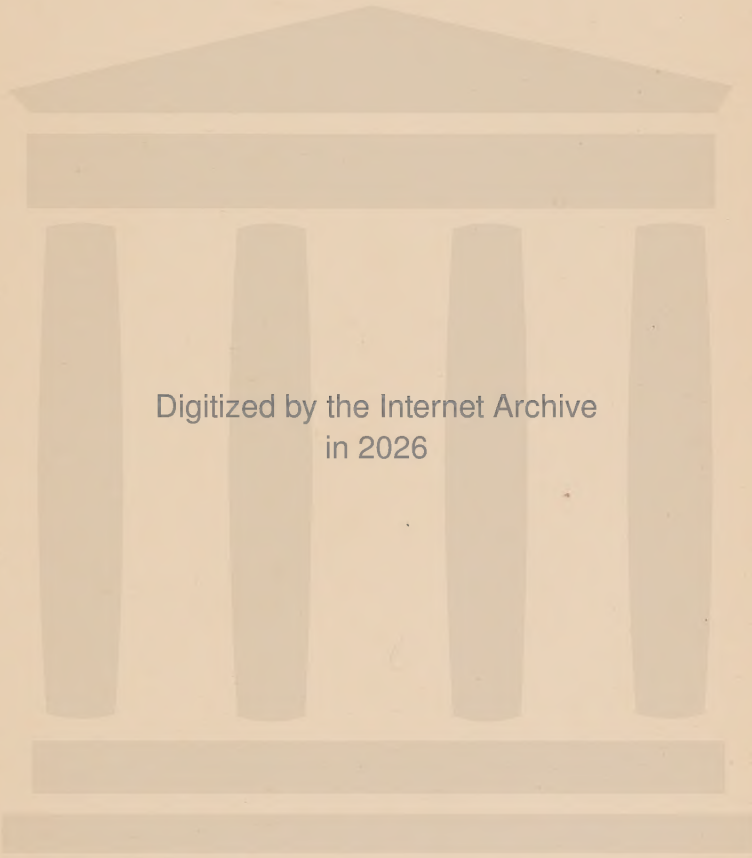


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"Act of Parliament, and notwithstanding anything contained in "such Act."

By s. 32, sub-s. 1, of the Manchester Ship Canal Act, 1936: "Whenever any vessel is sunk stranded or abandoned in any "part of any river canal waterway navigable channel lock or dock "forming part of the harbour or port of Manchester or of the "undertaking the company may cause the vessel "to be raised or removed." By sub-s. 2: "The company "may recover from the owner of any such vessel all expenses "incurred by the company under this section in connection with "that vessel.":—

Held, that the expenses were not a "loss or damage to "property or rights"; further that it was doubtful whether they could be said to be proximately caused by "the improper navigation or management of the ship"; and therefore that the plaintiffs could not limit their liability in respect of these expenses

ACTION OF LIMITATION OF LIABILITY.

The plaintiffs, the owners of the steam barge *Millie*, sought a decree of limitation of liability in respect of the damages arising out of a collision with the steamship *Sigrun*, on February 28, 1939, in the Manchester Ship Canal.

The *Millie* sank, and, being an obstruction to vessels, was raised by the Manchester Ship Canal Company under their statutory powers. The plaintiffs admitted that the collision was caused by the negligent navigation of the *Millie*.

The defendants were "the Manchester Ship Canal Company "and all persons claiming to have sustained damage by reason "of the collision and/or the subsequent sinking," namely, the owners of the *Sigrun* and the owners of other vessels which had been delayed owing to the canal being obstructed. These latter defendants did not appear, but the Manchester Ship Canal Company alleged that by reason of s. 32 of the Manchester Ship Canal Act, 1936, they were entitled to recover from the plaintiffs all expenses incurred in connection with raising the *Millie*, and that the plaintiffs were not entitled to limit their liability under the Merchant Shipping Acts in respect of the claim of the company.

The registered tonnage of the *Millie* ascertained in accordance with the provisions of the Merchant Shipping Acts was 110.35 tons. The amount, therefore, of the plaintiffs' liability at 8*l.* a ton was 882*l.* 16*s.*, and the plaintiffs claimed

a declaration that, on payment of this sum with interest thereon into Court, all further proceedings should be stayed.

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J. A. Petrie for the plaintiffs. The words of s. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, are very wide. The shipowner is entitled to limit his liability in respect of damage or loss caused "to property or rights "of any kind." The company's fairway has been obstructed and they have suffered a damage or loss caused by the improper navigation of a ship. In *The Chr. Knudsen* (1) *Bateson J.* held that the expenses of the removal of a barge sunk in a dock was "damage done by a ship" within the meaning of s. 22 of the Supreme Court of Judicature (Consolidation) Act, 1925. Sect. 32 of the Manchester Ship Canal Act, 1936, was passed in consequence of the decision in *The Sentry* (2) that neither vessel was to blame for a collision in the canal, and, as one of the vessels sank and had been abandoned by her owners, the canal company could not recover the expenses of raising her. To meet this difficulty sub-s. 6 of s. 32 provides that "owner" shall include the owner at the time of the sinking or abandonment. This section of a private Act cannot override the provisions of a public general Act to the detriment of the public at large: see the observations of Lord Loreburn in *Great Northern and Piccadilly Ry. Co. v. Attorney-General* (3) and *Wallasey United Tramways and Omnibus Co. v. Wallasey U. D. Council*. (4) The Act obviously was never intended to put the canal company in such a privileged position as that for which the defendants contend, for limitation of liability in certain cases has been expressly saved in some of their statutes: s. 9 of the Manchester Ship Canal Act, 1897, for instance, expressly saves and applies parts of s. 503 of the Merchant Shipping Act, 1894, and gives the express right to shipowners to limit their liability in respect of any damage to portions of the canal, including the area in question in this case.

E. W. Brightman for the defendants. Sect. 1 of the

(1) [1932] P. 153.

(3) [1909] A. C. 1, 6.

(2) (1934) 49 Ll. L. R. 201.

(4) (1900) 17 Times L. R. 152.

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Merchant Shipping (Liability of Shipowners and Others) Act only applies to cases of loss or damage caused by the improper navigation of the ship. If, therefore, the plaintiffs' argument be correct, they can limit their liability if they have been negligent and cannot do so if they are free from blame; an anomaly which the Legislature cannot have intended. There is no reported case in which a shipowner has been allowed to limit his liability in respect of the expenses of raising the ship. In *The Countess* (1) the case proceeded on the footing that the expenses of raising were not to be included in the limitation fund.

These expenses, first, are not "loss or damage" within the meaning of the section, and, secondly, were not caused by reason of the improper navigation of the *Millie*; they were caused by the defendants' statutory duty to remove an obstruction: see *The Ella* (2). The expenses would arise whether the barge was negligently navigated or not, and the collision was not the proximate cause of their being incurred. The statute deals with damages and nothing else, and does not contemplate such expenses as these. *The Chr. Knudsen* (3) is no authority for the plaintiffs' proposition; it was a decision on other words in a statute dealing with totally different matters.

Assuming, however, contrary to the defendants' contention, that these expenses would come within the ambit of s. 1 of the Act of 1900, the plaintiffs still are not entitled to limit their liability in respect of them by reason of the plain language of s. 32 of the Manchester Ship Canal Act, 1936. The Act was passed for the protection of the canal company and there is no saving clause as regards limitation as in some of the earlier canal Acts. "If the particular Act gives in 'itself a complete rule on the subject, the expression of that 'rule would undoubtedly amount to an exception of the 'subject-matter of the rule out of the general Act': per Keating J. in *London, Chatham and Dover Ry. Co. v. Wands- worth Board of Works* (4), quoting Lord Westbury in *Ex parte*

(1) [1922] P. 41; [1923] A. C. 345.

(3) [1932] P. 153.

(2) [1915] P. 111.

(4) (1873) L. R. 8 C. P. 185, 189.

St. Sepulchre's. In re the Westminster Bridge Act (1); the complete rule is that the company can recover such expenses in full. [Reference was also made to *The Molière*. (2)]

J. A. Petrie in reply. In *The Countess* (3) the expenses of raising the vessel were included in the cost of patching her and were the subject of agreement; the case therefore is no authority for the proposition that the expense of raising, per se, cannot be the subject of limitation proceedings.

The proximate cause of these expenses being incurred was not the defendants' statutory duty to raise the barge; they "may" do so or they could have called on the plaintiffs to remove the obstruction themselves. The expenses were caused by there being a vessel on the bottom of the canal, and its presence there was caused by the collision due to the plaintiffs' negligence. The chain of causation is complete.

[LANGTON J. referred to *The Paludina*. (4)]

The obstruction and consequent expense to which the defendants were put were a "damage or loss" to their undertaking and are within the wording of s. 1 of the Merchant Shipping Act, 1900, and the liability arose under a private Act of Parliament for which s. 3 expressly provides.

Cur. adv. vult.

1939. July 11. LANGTON J. read the following judgment: This case raises directly a matter of some importance both to shipowners and to canal and harbour authorities. The matter comes before the Court in a suit for limitation of liability by the owners of the steam barge *Millie*. On February 28, 1939, the *Millie* collided with the Danish steamship *Sigrun* in the Manchester Ship Canal. In consequence of the collision the *Millie* sank in the fairway of the canal and became an obstruction to vessels navigating in the canal. The Manchester Ship Canal Company, in pursuance of their statutory rights and duties, raised the *Millie* and removed her from the canal, and have in so doing incurred considerable expense.

The plaintiffs in the present action claim to limit their

(1) (1864) 33 L. J. (Ch.) 372.

(2) [1925] P. 27.

(3) [1922] P. 41; [1923] A. C. 345.

(4) [1927] A. C. 16.

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liability in respect of the collision between the *Millie* and the *Sigron* and have joined as defendants to the action the Manchester Ship Canal Company. By their statement of claim they admit that the collision was caused by the negligent navigation of the *Millie* and offer to pay into Court the sum of £821. 10s., which is the aggregate amount of £1 a ton on the tonnage of the *Millie* ascertained according to the Merchant Shipping Acts.

The Manchester Ship Canal Company refuse to admit that the plaintiffs can limit their liability in respect of the expense incurred in raising and removing the *Millie*. In support of this refusal they point, first, to s. 32 of the Manchester Ship Canal Act, 1930, by which they claim to be entitled to recover all the expenses which they have incurred in connection with the *Millie*, and secondly, they say that none of the Merchant Shipping Acts which deal with limitation of liability apply to an expense such as they have incurred in raising and removing the barge.

At a first glance the wording of s. 3 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, seems to be in such wide terms as to cover any liability to which an owner might have become subject as a result of a negligent collision. It will be remembered that this Act incorporates and extends the already wide power of limitation conferred on shipowners by s. 503 of the Merchant Shipping Act, 1804, and it will be noted that s. 3 of the Act of 1900 expressly declares that the right of limitation "shall apply whether the liability arises at common law or "under any general or private Act of Parliament and not "withstanding anything contained in such Act." Upon the wording of this section Mr. Petrie for the plaintiffs founded a strong argument that no subsequent private Act, such as the Manchester Ship Canal Act, 1930, could be held to have taken away what this general Act had intended to confer. The answer put forward on behalf of the canal company was that no such right ever had been conferred either by the Act of 1804 or by the Act of 1900, and that in any case the right conferred by s. 32 of the Manchester Ship Canal Act, 1930,

was absolute in its terms and the Act contained no saving of any section or portion of the Merchant Shipping Acts.

If I had to determine this matter upon the latter of these arguments I should have had great hesitation in holding that, where a private Act of Parliament and a public Act were in conflict, the private Act, even though much subsequent in date, should be held to override the public one. On this point one cannot but bear in mind the language of Lord Loreburn L.C. in *Great Northern, Piccadilly and Brompton Ry. Co. v. Attorney-General* (1): "It may be a hard case, "but the result cannot be avoided by appealing to this clause, "s. 40, in a private Act. The Courts will take every means "of defeating an attempt by a private Act to affect the rights "either of the Crown or of other persons who have not been "brought in. And I desire to say for myself that I am not "satisfied in regard to these private Acts of Parliament that "there are sufficient means either for securing accurate "drafting or for safeguarding the rights of persons other than "those who are concerned in the private legislation." I have, however, formed the view that this extremely difficult and important matter falls to be determined rather upon a close consideration of the wording of the statutes in question than upon a mere broad estimation of the comparative values of a public and a private Act.

It is necessary, first, to examine with care the full and exact limits of the rights conferred by Parliament on ship-owners in the matter of the limitation of their liability. For this purpose one must turn, first, to s. 503 of the Merchant Shipping Act, 1894. By this section the owners of a ship are afforded the relief of limitation in the four cases enumerated in sub-s. 1 under the sub-headings (a), (b), (c) and (d). It is sufficient for the present purpose to note that all these sub-headings are concerned with damage or loss caused to persons or things on board either the ship doing the damage or some other ship which has been affected by the damage. It was not until the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, that the area of this right of limitation

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(1) [1909] A. C. 1, 6.

1840
The
Matter
[unclear]

was extended to a wider field than that of carrying ships by s. 1 of the Act of 1825 the right of limitation was extended to "all cases where persons their vessels, boats or property" "any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or movable." I have already adverted to the wide terms and the extension contained in s. 1 of this Act, and it only remains to be noted that these include "the whole of" "any loss and damages which may arise upon any one" "former occasion, although such loss and damages may be sustained by more than one person."

At this point it is I think necessary to compare the wording of the Merchant Ship Canal Act, 1825, on which the canal company rest their case. Omitting irrelevant words it is now as follows:— "(1) Whenever any vessel is sunk, stranded or abandoned to any part of—of any canal or branch part—of the undertaking, the company may if they think fit cause the vessel to be raised or removed."

(2) The company may recover from the owner of any such vessel all expenses incurred by the company under this section in connection with that vessel."

Since the canal company claim that the expenses which they have incurred in raising and removing the *Waller* do not fall under any of the heads through which the claimants are entitled to claim limitation, the wider words of s. 1 of the Merchant Shipping Act, 1825, fall to be specially considered. It do not go back to s. 103 of the Act of 1824, because it seems to me to be manifest that the expenses in question could possibly fall under any of the sub-headings there enumerated. In s. 1, however, of the Act of 1825 the right is extended to "any loss or damage caused to property or rights of any kind, whether on land or on water, or whether fixed or movable." It is evidently agreeable that although expenses may not be loss or damage strictly so called, equally the right of the canal company to an unobstructed highway has in this case been interfered with, and it is no great stretch of language to describe the price of restoring that right as a

form of a loss or damage. The difficulty, however, is to see how the loss or damage in question is caused to any property or right. To state the matter as exactly as possible: the right of the canal company is infringed by an obstruction; the removal of the obstruction causes a certain expense; but neither the right nor the property of the company has thereby suffered any loss or damage. To illustrate the matter in legal language, the canal company, in seeking to recover these expenses under its statutory rights, is proceeding rather by way of a simple action for debt than by laying its action in tort against the shipowner.

This class of test in matters of construction—namely, to attempt to gauge the meaning by applying notionally the appropriate legal remedy—has lately received sanction in the Court of Appeal in *Hall Brothers Steamship Co. v. Young*, (1) In that case and in an earlier case, *Furness, Wilky & Co. v. Duder* (2) the whole matter in dispute came to be resolved on this class of test. I do not pretend to cite these cases as authority in the present instance, since in both of them the words for construction were far narrower than the wide language of s. 1 of the Act of 1900. I only recall them here to justify the application of the same kind of criterion as one of the tests in what is to me a nicely balanced question of language.

Or again, taking the words of s. 1 under consideration, all the rights thereby conferred are in respect of loss or damage caused "by reason of the improper navigation or management of the ship." A point much pressed by Mr. Brightman, for the canal company, was that the expenses which he claimed in full were not in any proper or legal sense caused by reason of the improper navigation of the *Millie*, but were caused by the fact of her having become an obstruction, which in turn was due to the fact that she sank in that particular spot, and not to the remote cause of her sinking which happened to be the negligence of those on board her. If, for example, the *Millie* had been sunk without negligence on the part of those in charge of her in the self-same spot,

(1) [1939] 1 K. B. 748.

(2) [1936] 2 K. B. 461.

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her owners could have had no answer to the claim by the canal company to recover the expense of raising her. It would indeed be remarkable, though not without precedent (see *The Mostyn* (1)), if the canal company were placed in a worse position because those who had infringed their rights had been negligent than they would be if the shipowners had not been negligent. I own that I am not very much impressed by this line of argument, not only because it did not suffice to convince the House of Lords in *The Mostyn* (1), but also because it is possible to imagine that the Legislature, if they had addressed their minds to the point in question, might have felt that the dock company should be made to share, together with others who had suffered damage, an abatement of recompense in order to relieve the shipowner hardly pressed by a grievous calamity. On the other hand I am very greatly impressed by the inadequacy of the language, even in this widely drawn section, to cover an item of expense not immediately connected with the actual occurrence of the original loss. Without attempting to enter too deeply into the baffling problem of causation, I doubt whether this expense can be said to be directly caused by the improper navigation of the *Millie*, and for both of these reasons, though principally upon the ground of the inadequacy of the language, I am of opinion that the statute does not cover the expenses incurred by the canal company.

Only one decision was cited to me on this aspect of the question. In *The Chr. Knudsen* (2) Bateson J. decided that expenses incurred in and about the lighting, buoying, removal and destruction of a barge sunk in the Stalbridge Dock, Garston, constituted "damage done by a ship within s. 22, "sub-s. 1 (a) (iv.), of the Supreme Court of Judicature (Consolidation) Act, 1925." I do not know whether it is necessary for me to try to determine whether I should have arrived at the same conclusion as Bateson J. in that case. It is perhaps sufficient to point out that the statute then under consideration was not the present one and the language is by no means identical. The distinction between actions for tort, which

(1) [1928] A. C. 57.

(2) [1932] P. 153, 156.

are plainly covered by the words "any claim for damage "done by a ship," and actions for debt, which may be only a remote result from damage done by a ship, was not apparently brought to the mind of the learned judge in argument. I cannot, therefore, regard this decision, much as I respect it, as being a direct authority upon the present point, and apart from this decision the point appears not to be covered by any authority at all.

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At the outset of his argument Mr. Brightman for the canal company laid great stress on the decision in the case of *The Countess*. (1) In that case the *Countess*, by negligently putting her engines ahead instead of astern, crashed through the dock gates belonging to the Mersey Docks and Harbour Board, and after doing and receiving serious damage had to be beached. The actual damage done to the defendants' docks and works amounted to 10,014*l*. Independently, however, of this large sum, the Mersey Docks and Harbour Board incurred another expense amounting to 1048*l*. in patching the *Countess*, getting her into dock and repairing her for her owners. [The learned judge distinguished *The Countess* (1) upon the three following grounds : (i.) that, so far as the smaller figure was concerned, since the *Countess* was in danger where she lay beached, the Harbour Board could have claimed at least this sum, and might well have been awarded a great deal more if they had claimed by way of salvage ; (ii.) the sum in question was at least partly incurred by way of repair to the plaintiffs' vessel, an item for which the plaintiffs' could under no circumstances limit their liability ; (iii.) since the whole matter went by agreement so far as this smaller sum was concerned, it would be very unwise to regard the case as constituting a precedent on one side or the other.]

There remain to be considered some further questions concerning the history of the private legislation of the Manchester Ship Canal.

The leading statute dealing with the Manchester Ship Canal appears to have been the Manchester Ship Canal Act, 1885. Since that time numerous Acts have dealt

(1) [1922] P. 41; [1923] A. C. 345.

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with the rights of the company, and with portions of the property which it owns, usually referred to therein as the "undertaking." In some of these Acts express reservations have been specially inserted to save the rights of other parties under the Merchant Shipping Act. For present purposes the most striking clause of this character is perhaps clause 9 of the Manchester Ship Canal Act, 1897. By the terms of this section certain provisions of Part 8 of the Merchant Shipping Act, 1894, referring to the liability of shipowners, including sub-s. 2 of s. 503, are expressly saved and applied to the Manchester Ship Canal Act, 1897. Furthermore, the section contains an express right to shipowners to limit their liability for any damage to a certain portion of the canal which, as I understand it, includes the part in which the accident at present under consideration took place. Again, in 1904 another private Act was passed containing, in s. 51 thereof, a saving from provisions of the Merchant Shipping Act, 1894, and of other general Acts relating to docks and harbour dues.

The existence of these savings in some of the private Acts, and the absence of any such saving in the Manchester Ship Canal Act, 1936, provided ground for argument upon both sides in the present case. Mr. Petrie, for the plaintiffs, pressed upon me the saving in s. 9 of the Canal Act, 1897, as showing that the canal company were not intended by Parliament to be on any special or privileged footing as regards a shipowner's right to limit his liability. Against this, Mr. Brightman, for the canal company, pointed with force, first, to the fact that the canal company's Act of 1936, which conferred the special right as to recovery of all expenses, was bare of any saving clause such as was contained in the earlier private Acts. He contended that it was inconceivable that such an omission could possibly have been made *per incuriam*. Secondly, he argued that the absence of such a saving clause afforded strong confirmation of his reading of the Acts relating to limitation of liability of shipowners, since this very pointed omission afforded evidence of the difference which the Legislature intended to draw between a right to limit in respect of

damage or loss on the one hand, and these special or remote expenses on the other.

To sum up, the three principal points in favour of the shipowners' contention are, first, that the words both of s. 1 and of s. 3 of the Act of 1900 are extremely wide. The words of s. 1 seem almost designed to cover any form of damage and expenditure; they even refer to rights on land or on water. Secondly, the words in s. 3 are definite in applying the Act to cases arising under a private Act of Parliament, and the Act on which the Manchester Ship Canal Company relies is a private Act of Parliament. For the reasons I have stated I do not think that the liability in question can properly be classed under the headings "loss or damage," but it cannot be denied that it is a liability which arises under a private Act of Parliament. Thirdly, the judgment of Bateson J. in *The Chr. Knudsen* (1), although not an authority directly in point, undoubtedly gives to the shipowner great warrant for the argument that this class of expense falls within the wide words of the statute.

Against this there appear to me to be strong points in favour of the canal company. First, on a close examination of the words upon which the shipowners are compelled to rely, a fair interpretation of these words does not seem to include the expense in question. Secondly, upon the application of the rule of proximate cause, it seems, although a matter of doubt, to be wrong to say that this expense was proximately caused by negligence. The statute gives relief against all damage or loss caused by negligence, but it does not necessarily give relief in respect of incidental expense arising out of some special circumstances which supervene after the first effects of the negligence have already been exhausted. Thirdly, there is the noticeable absence of any clause saving the rights of limitation conferred by the Merchant Shipping Act in a class of private statute where such savings have often been made, and as to which the full force of Lord Loreburn's observations in *Great Northern, Piccadilly Brompton Ry. Co. v. Attorney-General* (2) hardly applies, since it cannot be

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(1) [1932] P. 153.

(2) [1909] A. C. 1.

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imagined that the Manchester Ship Canal Company could get a private Act through Parliament without the shipowning body being at least fully aware of the powers against themselves which were being asked for and granted.

In conclusion, I would say that the point appears to me to be a nicely-balanced one, and in the absence of any guidance from previous authority the best interpretation which I can put upon the terms of these statutes results in favour of the Manchester Ship Canal Company. Accordingly the plaintiffs' claim to limit their liability against these defendants in respect of this head of expense fails and must be dismissed, with costs.

The plaintiffs are entitled to a decree of limitation as against the other defendants.

Solicitors for the plaintiffs: *Pritchard, Sons, Partington & Holland, for Batesons & Co., Liverpool.*

Solicitors for the defendants: *Hill, Dickinson & Co.*

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July 26, 27;
Oct. 17.

Shipping—Collision—Navigation in Copenhagen Sound—Narrow channel—Regulations for Preventing Collisions at Sea, 1910, art. 25.

The plaintiffs' and defendants' steamships came into collision in Copenhagen Sound, about 200 metres to the eastward and a little to the northward of the Lappegrund light vessel. When the vessels first sighted the lights of one another the plaintiffs had the starboard light of the defendants' vessel on their port bow, and the defendants had the port light of the plaintiffs' vessel on their starboard bow. In these circumstances, under the crossing rule (art. 19) it was the duty of the defendants' vessel to keep out of the way. The defendants, however, alleged that the part of the waterway in which the collision occurred was a narrow channel, and therefore that art. 25 applied, under which each vessel had the duty to keep to her own starboard side of the channel:—

Held, without making any pronouncement binding in future cases upon different evidence, that, at the present time upon the evidence adduced and with the advice of the Elder Brethren, the Sound, in the way of the Lappegrund light vessel, should not be declared to be a narrow channel for the purpose of the Collision Regulations; that the crossing rule applied; and that the defendants' vessel was alone to blame for not complying with that rule.

ACTION of damage by collision.

The plaintiffs were the owners of the steamship *Jeanne M.*, and her master and crew suing for their lost effects. The defendants were the owners of the steamship *Varmdo*. The collision took place in the Sound, the waterway separating Sweden and Denmark, near the Lappegrund light vessel, on the night of December 17, 1938. The *Jeanne M.* was proceeding up the Sound in a northerly direction, and the *Varmdo* was coming through the Sound in a southerly direction. When the vessels first sighted each other's lights, they were on crossing courses, the *Jeanne M.* having the starboard light of the *Varmdo* open on her port bow, and the *Varmdo* having the port light of the *Jeanne M.* on her starboard bow.

The case is only reported on the alleged application of the narrow channel rule, and not the crossing rule, and the facts material to this issue are fully stated in the judgment.

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Gordon Willmer K.C. and *J. V. Naisby* for the plaintiffs.

The Sound, in the vicinity of the Lappegrund light vessel, is not a narrow channel ; there is a minimum of a mile of deep navigable water, and neither Denmark nor Sweden has made any ruling about it. It does not even follow that a waterway, which in one case has been held to be a narrow channel within the meaning of art. 25 of the Regulations, always remains so ; it is a question partly of evidence and partly of nautical advice : see *The Minnie* (1) and the later case of *The Oporto* (2), as regards the Swin Middle in the Thames estuary. On the evidence called from the light vessel itself there is clearly no definite practice as suggested by the defendants.

Further, even if, contrary to the plaintiffs' contention, the narrow channel rule applies it does not exclude the application also of the crossing rule (see *The Ashton* (3)) ; and having regard to the relative positions of the two vessels on courses crossing at a considerable angle the governing rule to be applied is the crossing rule (art. 19), under which the *Varmdo* had the duty of keeping out of the way and the *Jeanne M.* the corresponding duty (under art. 21) to keep her course and speed, and this the *Jeanne M.* did until such time as the *Varmdo* could not, by her own unaided action, avoid the collision. Whichever rule applies the duty of the *Varmdo* was the same, namely, to get port to port with the *Jeanne M.*

[Reference was also made to *The Treherbert*. (4)]

K. S. Carpmael K.C. and *H. L. Holman* for the defendants.

The part of the Sound in question is clearly a narrow channel and the narrow channel rule applies ; there is no room in the present case for the application of the crossing rule. That rule can only be applied in a narrow channel when, for example, one vessel is coming from a side channel into the main channel (see *The Ashton*. (3)) A narrow channel need not have length ; and art. 25, it is suggested, is applicable at any rate over a reasonable distance each side of the Lappegrund light vessel. Even if the navigable waterway is taken to be a mile or a mile and a quarter wide, it is still a narrow channel and comparable,

(1) [1894] P. 336.

(2) [1897] P. 249.

(3) [1905] P. 21.

(4) [1934] P. 31.

for example, to the entrance to Cherbourg (*The Kaiser Wilhelm der Grosse* (1)) ; the Solent (*The Assaye* (2)) ; or the Bosphorus (*The Fiumana* (3)). In any event the *Jeanne M.* is to blame : under the narrow channel rule, because she was not on the proper side of the channel, or, under the crossing rule, because she did not keep her course under art. 21.

Gordon Willmer K.C. replied.

Cur. adv. vult.

1939. Oct. 17. LANGTON J. read the following judgment : This case raises a question of some importance. Apart from the fact that the *Jeanne M.* foundered as a result of the collision which in itself renders the case of interest to a considerable number of persons, although happily the foundering was not accompanied by any loss of life, a question of general interest also emerges. The collision took place in the waterway which separates Sweden and Denmark known as the Sound, and this case raises directly the point as to whether the Sound, or that part of it in which the collision actually occurred, should be held to be a narrow channel.

For reasons which I shall give hereafter I have come to the conclusion that the *Varmdo* was alone to blame for the collision, and I have further come to the conclusion that her case, which was not well founded in fact, was also misconceived in law, in that it was based upon the supposition that the Sound, at least in that part of it in which the collision occurred, was a narrow channel. I desire, however, to make it clear at the outset that so far from attempting in any way to bind any one who may have to consider this question in the future, I do not even wish to exclude myself from arriving at a different determination upon different evidence in a future case. I must, therefore, only be taken to be laying down that upon the evidence before me on this occasion, and with the advice which I have received from the Elder Brethren, who have given me valuable assistance, I have reached the determination that it is not at the present moment either

(1) [1907] P. 259.

(2) [1905] P. 289.

(3) (1931) 39 Ll. L. R. 32.

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right or desirable to hold that the Sound in the way of the Lappegrund light vessel should be declared to be, or treated as, a narrow channel for the purposes of the Sea Rules.

Reverting now to matters of detail, the *Jeanne M.* was a British vessel of 1973 tons gross and 279 feet in length. The *Varmdo* is a Swedish vessel of 2956 tons gross and 318 feet in length. The collision took place about 8.30 P.M. on December 17, 1938. The *Jeanne M.* was proceeding up the Sound in a northerly direction, and having approached the Kronborg Light at Helsingor, on a course of N. $\frac{1}{2}$ E. magnetic, altered her course to N. by W. $\frac{1}{2}$ W. magnetic when abreast of that light. The *Varmdo* which was coming through the Sound in a southerly direction was on a course of S. 45° E. magnetic when the *Jeanne M.* was first sighted.

According to the defendants' case, the *Varmdo* was thereafter navigated at first under a light starboard helm, and eventually under a hard-a-starboard helm, in order to comply with what they claimed to be the regulation prevailing in the Sound, namely, the narrow channel rule laid down by art. 25. I have considerable doubt as to whether on the night in question the devotion of the master of the *Varmdo* to art. 25 was anything like so intense as it became before me at the trial of this case in July. Indeed I doubt very much whether Captain Nilsson was really concerned until he got into Court with the application of this rule to his navigation. On the other hand I have borne in mind that he is not only a native of Sweden, but is accustomed to make this voyage month after month and year after year. I see no reason to doubt that he has a customary and also a sensible method of making it, and it may well be that in consideration of the set of the current and the general trend of the traffic, he has found it convenient to make his south going journey upon the general lines which he has described. It may even be a practice for local vessels to allow the south bound ship to pass nearer to the Lappegrund light vessel than the vessel going north, though it is noteworthy that the observer called from the light vessel negatived any regular practice in this matter. Whether or no such practice exists, and there is no evidence

before me that it does, such a practice could in itself create no right of way in navigation. Unless, therefore, I can be satisfied upon evidence, and upon all the other factors which would render it proper to declare this place to be a narrow channel, it is clear from a glance at the chart that vessels approaching each other in the manner and upon the course which I have described would be subject to the crossing rules. There is no manner of doubt that when these two ships became conscious of one another, and began to navigate with reference to one another, the *Varmdo* had the *Jeanne M.* on her starboard bow and the *Jeanne M.* had the *Varmdo* on her port bow. The *Varmdo* had thus the duty to keep out of the way of the *Jeanne M.*, and the latter had the corresponding duty to the *Varmdo* to keep her course and speed. In addition it is conceded that the current was running to the northward, that is, against the *Varmdo* and under the *Jeanne M.*, and there was thus by the ordinary rules of seamanship the additional duty upon the *Varmdo* to ease her speed and allow the *Jeanne M.* to pass clear ahead of her if they should happen to arrive at a turning point, such as the Lappegrund light vessel, so nearly simultaneously as to make it necessary for one to give way to the other in order to pass the point in safety.

[His Lordship then dealt with the questions of fact at issue between the parties and said that the case for the *Jeanne M.* was that having altered to N. by W. $\frac{1}{2}$ W. magnetic and proceeded for some minutes upon her new course, the *Varmdo* passed across her course and on to her starboard bow. Very soon afterwards the *Varmdo* was seen to alter suddenly and without warning to starboard, and to open her red light and shut in her green. The *Jeanne M.* thereupon ported her wheel a little and blew two short blasts. Immediately afterwards the position became practically hopeless, because the *Varmdo* continued to swing to starboard and the engines of the *Jeanne M.* were put full speed astern. The *Varmdo* came on, struck the *Jeanne M.* with her stem in the way of No. 2 hold on the starboard side, and the *Jeanne M.*, after attempting manœuvres to beach herself, sank in the Sound.

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The defendants, his Lordship said, agreed that the vessels were originally on crossing courses, but denied that they had ever crossed the course of the *Jeanne M.* in such a way as to show their green on her starboard bow. They claimed that very soon after observing the two masthead and red lights of the *Jeanne M.*, the *Varmdo* was put under slight starboard helm, and so kept for some minutes, while the vessels continued to approach. Their case against the *Jeanne M.* was that it was usual for north going vessels to pass Lappegrund upon a course of N. by E. to N. N. E. at a distance from the light vessel of some 500 metres thus leaving room for down coming vessels to pass port to port between the north going vessels and the Lappegrund Light. Instead, however, of maintaining her course the *Jeanne M.*, at a time when her lights were already bearing fine on the starboard bow of the *Varmdo*, turned to port and opened her green light to the *Varmdo*. She then continued to come on, shutting in her red light, and sheering or altering her course towards the *Varmdo*, making it impossible for the *Varmdo* to pass between the *Jeanne M.* and the Lappegrund light vessel, and throwing herself across the course of the *Varmdo*.

On these issues, his Lordship said he found first, that the collision occurred about 200 metres to the eastward and a little to the northward of the Lappegrund light vessel; secondly, that the headings of the respective vessels at the time of the collision were much as claimed by the *Jeanne M.*, namely, N.W. and S.W.; and thirdly, that the *Varmdo* crossed the bows of the *Jeanne M.* in such a way as to show her green light on the starboard bow of the *Jeanne M.*]

[His Lordship continued as follows :] Upon any conceivable findings of fact it would seem to me that the *Varmdo* must be held to blame for giving no warning by whistle signal during the many minutes that she was acting and acting in relation to the *Jeanne M.* under starboard helm. As was laid down clearly in *The Karamea* (1), if the helm action be light it is perhaps even more important to give notice thereof by whistle signal, since it is clearly less easy for the other vessel to perceive

(1) [1922] 1 A. C. 68, 79.

the effect of such helm action than where the action is sudden and heavy. Upon my findings of fact, however, the first and most important delinquency of the *Varmdo* is her breach of art. 19 in that, being a crossing vessel, she had an imperative duty to keep out of the way of the *Jeanne M.*, but took no proper or sufficient steps in due time so to do. In the second place she is much to blame upon the line I have developed above in failing to blow any signal during the time that she was using a light starboard helm. She is further to blame in keeping a bad lookout in what I have in previous cases called the broad sense, namely, in keeping an inaccurate observation upon the approaching vessel. She is also to blame in a matter of seamanship in not reducing her speed when she realized, or ought to have realized, that she would be approaching the *Jeanne M.* in the neighbourhood of the Lappegrund light vessel, since by so doing she might have facilitated their passing in safety at that point. Finally, having passed as I find she did on to the starboard bow of the *Jeanne M.*, it was inexcusable in the circumstances to starboard again from such a position. She had practically the whole of the channel upon her port side, and had she stood on without any alteration at all would have in fact avoided the collision, or alternatively could have made everything doubly safe by porting away from the *Jeanne M.*

The *Jeanne M.* on the other hand obeyed the Collision Regulations in keeping her course and speed under art. 21. The most serious point against her is as to whether she altered too soon in view of the stringency of the duty which lay upon her. Mr. Carpmael rightly and fairly pressed the family resemblance which the case bears to that of *The Orduna* (1), but I am satisfied that the analogy is not a real one. The distances were much shorter than those in *The Orduna* (1), and the necessity to take immediate action was accordingly far more urgent. It is true that, by porting, the *Jeanne M.* in fact broadened the angle of the blow, but the Elder Brethren advise me that in the circumstances this manœuvre of porting offered the best chance of escape since it was always

(1) [1921] 1 A. C. 250.

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possible that those on board the *Varmdo* would recognize their error in time to reverse their helm and engines and thus avoid the *Jeanne M.* or at least themselves reduce the angle and force of the collision.

In all the circumstances, therefore, I find the *Varmdo* alone to blame for the collision.

In conclusion, reverting to the broad point of interest as to whether the Sound is a narrow channel, it may be useful to recapitulate the considerations which have led me to a determination upon this question in this particular case. As I have noted above, the chief and guiding consideration has been that there was no evidence whatever outside the opinion expressed by Captain Nilsson that any part of the Sound, or this part in particular, was treated by shipping in general as subject to the narrow channel rule. Secondly, I had the advantage of the advice of one of the Elder Brethren who is exceedingly familiar with the navigation of this water-way. He advised me without the slightest hesitation that in his experience it has always been treated as open water and without regard to art. 25. Again, when one looks at the matter apart from evidence or skilled advice, from the point of view of general expediency one cannot but be struck by the fact that in this actual locality hard by the Lappegrund light vessel are two important local ports of Halsingborg and Helsingor. If any ruling is to be laid down construing any portion of the Sound to be a narrow channel it would seem important to make some subsidiary ruling as to how the vessels entering or leaving these ports are to conduct their navigation when respectively entering or leaving the channel. It was pressed upon me by Mr. Willmer that it would be almost impossible to declare any portion of the Sound to be a narrow channel because of the difficulty of delimiting the focal points and of declaring where any such narrow channel should begin. For my own part I would not feel so much pressed by this difficulty as by the complication which arises from the presence of the two local ports in what is almost the narrowest part of the whole channel. I cannot at the moment recall any case of collision in my experience which

has had for its locus in quo this well frequented spot. It would hardly seem, therefore, that the dangers of navigation here are at present peculiarly acute, but if future experience should go to show that a closer and clearer ruling would be desirable, I would not have it to be imagined that I have pretended to examine the whole problem in all its bearings, and to have attempted to pronounce any final judgment thereon.

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Solicitors for the plaintiffs : *Sinclair, Roche & Temperley, for Vaughan & Roche, Cardiff.*

Solicitors for the defendants : *Bentleys, Stokes & Lowless, for Bramwell, Clayton & Clayton, Newcastle-upon-Tyne.*

E. C. M. T.

1939

October 11.

RUSHBROOK v. RUSHBROOK (BY HER GUARDIAN).

Divorce—Desertion—Husband's petition—Respondent of unsound mind for over a year before filing of petition—No animus deserendi—Irrebuttable presumption—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 176, as amended by Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), s. 2 (b).

Where a spouse charged with desertion is proved to be insane and accepted in law by certification as such during the relevant period, there is an irrebuttable presumption that such spouse is incapable of an intention to desert.

HUSBAND'S PETITION for dissolution of marriage on the ground of alleged desertion for a period of at least three years immediately preceding the presentation of the petition.

The marriage took place in August, 1930. The wife deserted her husband in January, 1931. She was certified as insane in March, 1937, and had been detained in a mental hospital ever since. The husband presented his petition for divorce in April, 1938, and sought the exercise of the Court's discretion. By her guardian ad litem, the Official Solicitor, the respondent denied that she had originally deserted the petitioner, and in the alternative pleaded that such desertion had not continued throughout the prescribed period of three years immediately preceding the petition.

R. J. A. Temple for the petitioner. The decision of the Court of Appeal in *Williams v. Williams* (1) does not exclude the possibility in an appropriate case of rebutting the presumption that during certification a person of unsound mind is incapable of an intention to desert. If in fact the Court is satisfied that the person though of unsound mind is capable of a rational judgment on that particular matter, it may hold that he or she, though certified, still maintained the intention to desert; and that consideration seems to have been in the mind of Bucknill J. in *Bennett v. Bennett*. (2) I submit here that on the evidence the respondent after certification still had animus deserendi.

(1) [1939] P. 315; C. A. 365.

(2) [1939] P. 274, 279.

Holroyd Pearce (with him *Theodore Turner*) for the guardian
ad litem per contra.

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LANGTON J. This is not an easy case, and from the petitioner's point of view it is a hard case, but in my view both on the facts and the law the case is reasonably clear. The important dates in the matter are first, that the parties were married on August 4, 1930; secondly, that on January 21, 1931, the respondent wife undoubtedly deserted her husband without cause; and thirdly, that on March 7, 1937, a period of just more than a year before the presentation of this petition on April 20, 1938, the respondent was certified as a lunatic. During the whole of that succeeding year until the presentation of the petition she remained a certified lunatic, and in August of 1938 her condition, which up to that time was described by the doctor as an ascertainable condition of dementia praecox, the form of lunacy being the schizophrenic type, took a considerable turn for the worse, and the respondent to-day is still a certified lunatic, with little hope of recovery.

The case, as presented by Mr. Temple, was that, in spite of the fact that the wife had been, during thirteen months of the period prescribed by the Act as the last three years before the petition was presented, a certified lunatic, there was ground for argument that she was, during that period, able to exercise a sufficiently rational judgment upon the question of her relations with her husband to enable me to infer that she had a continuing animus deserendi. This question of the position of lunatics vis-à-vis desertion has lately received considerable illumination from the judgment of the Court of Appeal in *Williams v. Williams*. (1) Epitomizing for the moment the judgment of the Master of the Rolls, he says in terms that the act of desertion requires two elements on the side of the deserting spouse—namely, the factum of separation and the animus deserendi; and on the side of the deserted spouse one element—namely, the absence of consent.

Now, in this case there is no doubt at all about the factum

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of separation, and that the factum was accompanied by an animus deserendi is amply established by the petitioner's witness. The wife did desert the husband on January 21, 1931. It becomes then a question whether this animus deserendi can be said to have been continuing over the necessary period—namely, the last three years before the presentation of the petition in April, 1938. I have had, on behalf of the petitioner, some very careful, and I think very fair, evidence from the doctor in charge of the institution where the wife was under restraint for a very considerable period. She is not under his charge now, but during the material period—namely, from March, 1937, until April, 1938—she was continuously under the charge of Dr. Banbury, the medical superintendent at the Ipswich Mental Hospital.

The matter as left by the Court of Appeal in law in *Williams v. Williams* (1) seems to me to stand in this way: that where a person is proved to be a lunatic accepted in law by certification as a lunatic it is, in the words of the Master of the Rolls, impossible to make any inference at all that the lunatic is capable of having the animus deserendi. Mr. Temple has argued that that is not the meaning of the judgment in *Williams v. Williams* (1) in the Court of Appeal, and has argued that the passage in the judgment of Bucknill J. in *Bennett v. Bennett* (2) is the proper and still standing statement of the law on this subject—namely, that these cases are cases in which there is a rebuttable presumption, and that the rebuttable presumption is that if a person is a lunatic he is incapable of forming a rational judgment upon this question, but if medical evidence establishes that, in spite of his acknowledged weakness, it is possible for any individual lunatic to form a judgment upon this matter, that evidence can be admitted.

This dictum of Bucknill J. was before the Court of Appeal and considered by them before their judgment was delivered in *Williams v. Williams* (1), and although the case is mentioned in the judgment which fell from MacKinnon L.J. on more than one occasion, I do not understand any of the judgments

(1) [1939] P. 315; A. C. 365.

(2) [1939] P. 274, 279.

of the Court of Appeal to accept the principle laid down by Bucknill J. It is true that in that case Bucknill J. decided as a matter of fact that the presumption was not rebuttable, and therefore there was no reason why the Court of Appeal should desire to overrule a judgment with which they no doubt would agree, but I do not understand myself that they left this matter, where a person is once an accepted certified lunatic, as being open to argument at all. I read the judgment of the Master of the Rolls as meaning that it is not possible to make any inferences at all concerning people who are certified lunatics, and upon that ruling it seems to me that this case is unarguable. The first thing which I have to say about this case is that it is established that this unfortunate woman was a certified lunatic during at least one year of the necessary time, and that being so there is no more to be said about it than that in law it is impossible to argue that she was capable of any *animus deserendi*, and it is impossible, therefore, that the petitioner should succeed. In case, however, I am wrong in my view of the scope and effect of the judgment of the Court of Appeal, I have thought it wise to consider, from the angle presented by Mr. Temple, whether there is a case that could be made for the petitioner. [His Lordship then dealt with the evidence as to the wife's mental condition at the material time and continued:]

If, therefore, it be necessary and right to investigate questions of fact of this character, my decision is against the petitioner. For the reasons I have stated, I do not think that the proper reading of the judgment of the Court of Appeal in *Williams v. Williams* (1) allows such questions of fact to be entered into at all; but if it does I still cannot help the petitioner. The result, therefore, must be that this petition is dismissed.

Solicitors : *Worthington Evans, Daune & Co. ; The Official Solicitor.*

(1) [1939] P. 315; A. C. 365.

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REEVES v. REEVES (KING'S PROCTOR SHOWING CAUSE).

Divorce—Discretion—Decree nisi for wife petitioner—Wife's adultery after decree nisi—Intervention of King's Proctor—Purpose of interval before decree absolute—Not a test of morality—Principles applicable—Decree to stand—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 178, proviso, as amended by Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), ss. 4, 181, 183, sub-s. 1.

Although under s. 178 (proviso) of the Judicature (Consolidation) Act, 1925, the Court is not bound to pronounce a decree of divorce and may dismiss a petition if it finds that the petitioner has during the marriage been guilty of adultery, the interval interposed by s. 183 of that Act before decree absolute is not intended as a test of morality on the petitioner, but to enable the King's Proctor to make inquiries into the bona fides of his case.

Where an innocent wife obtained a decree nisi of divorce and thereafter committed adultery, and the King's Proctor intervened on that ground, the Court allowed the intervention but in the exercise of its discretion let the decree nisi stand.

WIFE'S UNDEFENDED PETITION for divorce.

The marriage took place in August, 1926, at Marylebone Register Office. On June 14, 1938, the wife was granted a decree nisi for the dissolution of her marriage on the ground of her husband's adultery. In December, 1938, the King's Proctor filed a plea alleging that since the decree nisi—in August and September, 1938—the petitioner had committed adultery with a named man. By her answer to the plea the wife admitted adultery on three occasions with that man since the decree nisi.

S. E. Karminski for the petitioner.

Holroyd Pearce for the King's Proctor.

Sir George Jones for the respondent.

1939. Nov. 15. BUCKNILL J. This is a plea by the King's Proctor showing cause why the decree nisi granted in this Division in June, 1938, in favour of Mrs. Elsie Reeves should not be made absolute, on the ground that, since the decree, she has committed adultery with a man called Harden Jones. There is no doubt about her adultery, because

Mrs. Reeves has admitted committing adultery with this man in August and September, 1938, at three places. The question which I have to decide is whether the decree should stand.

It does not seem to me that, in deciding that question, I must approach the matter from the point of view that the period of six months between the decree nisi and decree absolute is intended as a test of morality on the petitioner, or that it is right to impose a test of that kind. I think that the object of the six months is to enable the King's Proctor to make inquiries as to the bona fides of the petitioner's case.

It sometimes works great hardship, this six months' interval. One sometimes gets a case where a wife has been deserted by her husband twenty years ago, leaving her without any means, and she has been almost compelled to live with another man, to all intents and purposes as his wife, has children by him, and then gets a decree nisi and is placed in this difficult position, that if she leaves the man she has no means of living or of supporting her children. If the test to be applied is a test of morality, and one ought to refuse a decree in such a case because the woman, in those circumstances, continues to live with the man, it would be doing, I think, an injustice. I am sure that that is not the principle which I have to apply.

It is very much in favour of the petitioner that she came into Court in the first instance as an innocent person. She had been married to her husband in 1926, when she was twenty-one years old, and in 1935 her husband had left her to live with another woman, and, as I understand, continued to live with that woman up to the date of the hearing of the petition. The petitioner kept nothing back from the Court, but she has, on the other hand, committed adultery as a married woman—there is no doubt about that—during the interval between the decree nisi and decree absolute.

What are the facts which are material to this case? I must approach it, I think, very much on the lines laid down by Lord Merrivale in the classic case of *Apted v. Apted* (1),

(1) [1930] P. 246.

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and I must approach it as a case much less strong than it would be, or much less difficult, rather, than it would be, if what happened in August and September of 1938 had happened before the decree nisi was granted. There are no children of the marriage. There is no hope of a reconciliation between husband and wife. I think to some extent Mrs. Reeves was tricked by this man, who was a good deal older than herself, and posed as a widower when in fact he was married, and cajoled her, I think, into living with him by a promise of marriage when she had got her decree.

She had no means of her own ; she was living entirely on an allowance from her husband ; and I do not blame her for looking to the future and to the possibility of obtaining another husband. Unfortunately she did one extremely foolish and wrong thing. She gave a false reference, which has had this result, that an honest landlady has been defrauded of her rent. I think she may have come to that to some extent under the influence of this man, and I hope that she will seriously consider, in order to clear her good name, that her duty, her strong duty, lies in seeing that the money is paid back. However, I am not trying that issue ; it has nothing to do with me here ; it only throws some light upon her general credibility. She seems to be a rather foolish person, rather foolishly clever, which is perhaps one of the most dangerous kinds of folly there is. I think, on the whole, that public morality requires this marriage to be dissolved. I see no useful purpose in its going on any longer than is absolutely necessary. That being so, I shall allow the intervention but let the decree stand.

The petitioner was condemned in the costs of the King's Proctor.

Solicitors : *Bower, Cotton & Bower ; the King's Proctor ; Clifford Baron & Co.*

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Shipping—Limitation of liability—Hirer of barge who has undertaken "sole charge and management"—Barge owner responsible for wear and tear—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503—Merchant Shipping Act, 1921 (11 & 12 Geo. 5, c. 28), s. 1.

By s. 503 of the Merchant Shipping Act, 1894, the owner of a ship shall not, where without his actual fault or privity loss or damage is caused to goods on board the ship, be liable beyond an aggregate amount not exceeding 8*l.* for each ton of his ship's tonnage; and by s. 1 of the Merchant Shipping Act, 1921, this right of limitation is extended to the hirer of any barge "who has contracted to take over the sole charge and management thereof and is responsible for the navigation, manning and equipment thereof."

In March, 1937, the plaintiff hired a barge on the terms that the barge owner would not be liable for the consequences of any defect, whether patent or latent, existing at the time of hiring or subsequently appearing, and that the hirer must satisfy himself as to seaworthiness and fitness, and be responsible for all damage or injuries done by the barge while on hire. The owner, however, had to maintain the barge and make good all damage to her due to wear and tear.

On November 14, 1938, the barge loaded a cargo, and on the following morning was found to be water-logged, having leaked during the night owing to a hole in her chime angle due to wear and tear, and the cargo consequently was damaged. The barge had last been blocked for purposes of survey in March, 1936, and the plaintiff said that he always blocked his own barges every two years. The barge had safely carried perishable cargoes up to the time of the accident, and there was nothing to direct the plaintiff's attention to the state of the chime angle.

The plaintiff sought to limit his liability. The defendants, the owners of the cargo, contended that the plaintiff had not got the sole charge and management of the barge within the meaning of the Act of 1921, and, further, that the accident did not happen without his fault or privity:—

Held, (i.) that "management" included the duty to maintain the barge in a reasonably seaworthy condition, but that the plaintiff did not cease to be a person who had "the sole charge and management," merely because he had an arrangement that the barge owner should keep the barge in proper repair; (ii.) that on the facts, as the plaintiff had no reason to suppose that the barge was unfit, the Court could not say that he was guilty of any fault or privity; and accordingly that he was entitled to the decree of limitation claimed.

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LIMITATION OF LIABILITY.

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The plaintiff, Thomas Arthur Scanlan, sought to limit his liability in accordance with the provisions of the Merchant Shipping Acts to an amount not exceeding 8*l.* per ton on 73½ tons, the registered tonnage of the barge *Thames*, of which he was the hirer, for damage and loss caused to cargo by the barge being in a defective condition. The defendants were G. A. Bunting & Co., and all others the owners and parties interested in the cargo.

The facts are summarized in the headnote and fully set out in the judgment.

G. St. C. Pilcher K.C. and *Waldo Porges* for the plaintiff. The plaintiff had sole charge of the barge. Charge does not mean maintenance, and the questions of maintenance and responsibility for wear and tear are immaterial. If the defendants are right, charterers by demise who by s. 71 of the Merchant Shipping Act, 1906, can limit as owners (and see also *The Hopper No. 66* (1)) could practically never do so, for "fair wear and tear" is nearly always excepted in a charter by demise: see, e.g., *Baumwoll Manufactur von Carl Scheibler v. Furness* (2), and *Meiklereid v. West*. (3)

The plaintiff's own standard of care, according to which he blocks his own barges every two years, is not generally followed on the river; the owner of the barge only puts his barges on the blocks every three years. There was nothing to direct the plaintiff's attention to the fact that the barge needed repairs; the damage was undiscoverable unless the barge was blocked or the defect became apparent through leakage, and the loss occurred therefore without his fault or privity.

Gordon Willmer K.C. and *H. L. Holman* for *J. V. Naisby* (on active service) for the defendants. Sect. 1 of the Merchant Shipping Act, 1921, should be construed with emphasis on the word "sole"—"sole charge." It is only the hirer who has contracted to take over the sole charge and management,

(1) [1908] A. C. 126.

(2) [1893] A. C. 8.

(3) (1876) 1 Q. B. D. 428.

that is to say one who has accepted the full burden of ownership, who is entitled to the benefit of limitation. The plaintiff in the present case had not got to maintain the barge in good condition, he relied on the barge owner to withdraw her from hire from time to time for overhaul and to make good wear and tear; and the damage to the cargo arose from the unseaworthiness of the barge due to wear and tear.

If, on the other hand, the plaintiff is within the statute, the onus is on him to show that the damage took place without his fault or privity: *The Bristol City*. (1) He hired the barge without making any examination or inquiry, and took no steps to prevent the natural process of wear and tear, and therefore when these defects developed he was privity to them. He did not even apply his own standard of care and have the barge put on the blocks at the end of two years; indeed, he did not inquire when she had last been blocked. In these circumstances, if he had been the owner he could not have said that the damage happened without his actual fault or privity, and, as hirer, it is submitted, he cannot be in a better position.

G. St. C. Pilcher K.C. replied.

BUCKNILL J. This is a claim by Thomas Arthur Scanlan trading as Morgan Scanlan & Co., against G. A. Bunting & Co., and all others, the owners and parties interested in the cargo in the barge *Thames*. The plaintiff seeks to limit his liability in respect of damage to cargo carried in the *Thames* to the statutory limit of 8*l.* per ton.

The *Thames* is an open steel barge owned by Messrs. Donovan & Co. Barges Ltd., of the registered tonnage of 73½ tons and of a burthen of 122½ tons. The statutory limit of liability would be based on the 73½ tons.

The essential facts are that on November 13, 1938, the *Thames* was placed alongside the steamship *Fazan* in the Regent's Canal Dock. On November 14 she loaded a cargo of 200 bags of peas, which were loaded aft, and 202 cases of

(1) [1921] P. 444, 453.

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toys which were loaded forward. She was left in the dock during the night of the 14th, and on November 15 she was found to be half full of water and damage to the cargo had been done. When she was subsequently put upon the blocks a hole was found in her bottom.

The question that I have to decide is whether the plaintiff is entitled to limit his liability. The plaintiff hired the barge from Mr. Donovan, or from Messrs. W. H. Donovan & Co., the owners, on these terms which appear on Donovan's bills: "Barge hiring conditions—We hereby give notice that we "will not be liable for the consequences of any defect whether "patent or latent in our barges or the gear belonging thereto "existing at the time of hiring or subsequently appearing "therein. Hirers must, therefore, satisfy themselves by "examination as to seaworthiness and fitness in all respects "for the purpose for which they are required before taking "possession thereof. Every barge is let upon the conditions "that the hirer shall be responsible for all damage or injuries "whatsoever done by or received by such barge while on "hire"

The facts which are material in connection with the *Thames* are these. She is now thirty-five years of age; she was purchased by Mr. Donovan in 1930. During the period between 1930 and 1932 he spent about 300*l.* upon her, including the re-riveting of the whole of her bottom. In 1932 she started work. In 1933, 1934 and 1935 the plaintiff hired her for short periods. In March, 1936, Mr. Donovan put her back on the blocks because of some collision damage and she was painted, but no other work was done as regards maintenance. In March, 1937, the plaintiff hired her again. He hired her at first under a daily rate and then at the cheaper monthly rate on the terms which I have read. She carried during the two months prior to this casualty, various cargoes of a perishable nature. In October she carried 100 tons of borax and cases of condensed milk, and in November she carried, immediately before this casualty, bags of onions which she discharged at Sunlight Wharf. She was then towed down to the entrance to the Regent's Canal Dock and entered

the dock and took cargo from the *Fazan*. It is fair to say that during the whole of the time that she was under hire to the plaintiff from March, 1937, to November, 1938, he never had any complaint of injury to cargo carried in her, nor did he ever have any complaints from any lighterman that the barge was making water.

After the damage had been done she was put on the blocks, and it was found that there was this hole in the chime angle. The chime angle is a right-angled piece of metal, the upright part of which is riveted to the side plates of the barge and the flat part is riveted to the bottom plates. The hole, which was in the way of the after bulkhead, was caused by wastage. There was also evidence of some set-up there. I am not satisfied that the set-up, which was quite small, was recent. It is probable that the wastage had started first and was accelerated by the set-up. But the cause of the damage undoubtedly, was the wastage of the metal of this chime angle. Apart from the condition of the chime angle the barge was in fair condition. There was no evidence which I accept that there was anything substantially the matter with the barge in any other respect. For a barge of her age she was in fair condition.

Those being the facts, the question arises whether the plaintiff is entitled to limit his liability. The main section of the Merchant Shipping Act, 1894, and the subsequent amending Acts, which govern the matter, provide that the owners of the ship—which now includes a barge like the *Thames*—shall not, where any damage or loss is caused to goods on board the ship without the actual fault or privity of the owners, be liable beyond the 8*l.* per ton. The amending Act of 1921, which extended the Act to lighters and barges under certain circumstances, specifically states that “the expression ‘owner’ shall include any hirer who has contracted to take over the sole charge and management [of the barge] and is responsible for the navigation manning and equipment thereof.”

Two points have been argued before me—first that the plaintiff had not got the sole charge and management of the

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Thames, and secondly, that if he had, he has not made out that the damage took place without his actual fault or privity. The terms under which the barge was hired do not deal with the duty of keeping the barge in seaworthy condition during the term of the hire which, in this case, went on from March, 1937, until November, 1938; it appears to be a verbal term of the agreement that the owner shall make good all damage to the barge which is due to wear and tear. Mr. Scanlan in his evidence said that it was the owner's duty to keep the barge in repair—"No business of mine," he said, "unless the barge received damage while on hire. I took no steps to repair her; I did not spend a halfpenny on upkeep or repair. I knew the reputation of Mr. Donovan; it was not my business to know when she had been blocked last. We have to rely on the reputation of the owner as to the barge's condition. I did not ask when she had last been blocked and I had no idea when she had last been blocked. We took advantage of slack times to get barges put in order. I did not regard myself as being in charge of her. I supplied the crew; I am not responsible for wear and tear. I have not got to block the barge. We suggest to Mr. Donovan that if we have nothing for the barge to do he had better have her back to look at her." The plaintiff also said "in the case of our own barges we are pretty strict about blocking a barge every two years." He owns thirty-six barges himself and hires other barges. "Two years at the latest from the date of the hire we should have said to Donovan 'what about blocking this barge.' They had the right to send for the barge and block her if they thought it necessary." Mr. Donovan, on the other hand, said in his evidence that his general practice was to block the barge every three years. "I generally get the barge back every three years to block her and paint her, and I pay for that myself. I should have had her back in March 1939. I was liable for ordinary maintenance." Other evidence was called to show that it was prudent in the case of a barge like the *Thames* to block her every year, but there is no rule about it—it is left to the business experience of the owner of the barge.

That being the position, the first question is, had Mr. Scanlan the sole charge and management of the *Thames* under these circumstances? It is admitted by Mr. Pilcher that the burden of proof is on him to bring the plaintiff within the privilege granted by the statutes under certain circumstances by which people are entitled to limit their liability which is unlimited at common law. The policy of these Acts was stated very clearly by Lord Loreburn L.C. in *The Hopper* No. 66. (1) "And we must," he says, "conclude that the policy of the "present section was simply to prevent ruinous damages from "being inflicted upon an innocent principal as the consequence "of an error of judgment in a difficult and dangerous business "by his agents in charge of a vessel. I can perceive no reason "why the present appellants should be subject to an unlimited "liability that does not equally apply to the registered owner. "I cannot doubt that if charterers by demise are to be so "subject there will be an end of such charters, and it is difficult "to suppose that Parliament desired this. It seems to me "that the mischief against which s. 503 was intended to "provide is not met by construing the word 'owners' in the "narrow sense, and that therefore the broader interpretation "which the word undoubtedly bears in many other parts of "the Act ought to be applied here."

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I think that justifies me in saying that the Court must try to interpret these Acts in a broad sense, if satisfied that the principle of the 1921 Act applies. The principle is that an owner, or a hirer, under the terms to which I have referred, is not liable for unlimited damage for the negligence of an agent. But in this case there is no question of the negligence of an agent at all. The two points are, first whether the plaintiff is a hirer who has contracted to take over the sole charge and management of the barge and, secondly, whether the accident has occurred without his actual fault and privity.

The matter seems to me to be one of some difficulty. I have first to consider what the word "management" means. I think that "management" must include the duty to

(1) [1908] A. C. 126, 131.

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maintain the barge in a reasonably seaworthy condition. If it does not, it would seem to put the hirer in an extraordinarily privileged position, because he would be entitled to hire a barge without taking any care to find out for himself that the barge was in a proper state to carry the cargo, and would rely upon the arrangement under the contract of hire that it was the duty of the owner to maintain the barge in a proper state of repair, and that he looked to the owner to do so. It seems to me, therefore, that "management" means that the hirer, before he can come under this section, must be responsible for the maintenance of the barge and for seeing that she is in a seaworthy state. I cannot think that he is entitled to hide behind somebody else and say that it was not his duty, but the duty of the owner to keep the barge in proper condition, and that he is entitled to limit his liability merely because he has in fact had charge of the vessel in the sense that his servants have actually navigated her, and that he has managed her in the sense that he has directed all the cargoes she should carry, and where she should go. But, at the same time, I am not prepared to say that he ceases to be a man who has sole charge and management of the barge because he has this arrangement with the owner by which the owner is responsible to keep the barge in proper repair. The hirer might have a contract with a ship repairer to do that for him, and nevertheless would be the man who had sole charge and management of the vessel, but he could not hide himself, so to speak, behind the repairer and say that because the repairer had not done his duty therefore he, the hirer, was not responsible.

I pass therefore to the second point, whether Mr. Scanlan has been guilty of any actual fault or privity. The strong point made by Mr. Willmer was that Mr. Scanlan's practice was to block his own barges every two years, and if this barge had been his own barge he would have blocked her in March, 1938. Had he done so I have no doubt he would have found this wastage, which must have existed to a very considerable extent by that time, on the evidence which I accept as to the time that it had been going on. Mr. Willmer argued

that if the plaintiff is to be treated as a man who is responsible for the maintenance of the barge before he can be said to be the man who has the sole management of it, and if that be the test which he himself applies, it cannot be said that this damage occurred without his actual fault or privity. In other words one must apply in this case the standard of care which Mr. Scanlan himself applies in the case of his own barges. That is an attractive proposition, but I think I must look at the matter from a rather broader point of view. Here are two gentlemen, Mr. Scanlan and Mr. Donovan, both men of experience and repute in the barge-owning world—gentlemen who, I am sure, would never think of allowing a barge to do its work if they had any reason to suppose that it was unsuitable for the purpose. There was nothing whatever in the history of the barge to lead anyone to suppose that there was anything the matter with her, and indeed, when she was blocked, apart from this one small hole in this one particular place, there was nothing to show that she required blocking even then. Giving full weight to Mr. Scanlan's own admission that he blocks his own barges every two years, I cannot say, on the facts of this case, that this damage was due to his fault or privity in any way. I cannot say that in my view he did anything which a reasonably prudent owner would not have done, relying as he did on Mr. Donovan to supply him with a seaworthy barge, knowing the history of the barge, having had it for a long period of time, and having nothing to direct his attention to this most unfortunate state of the chime angle at this particular spot.

That being so, in my judgment the plaintiff succeeds, and is entitled to the decree of limitation claimed.

Solicitors for plaintiffs : *Keene, Marsland, Bryden, Besant, Batham and Cork.*

Solicitors for defendants : *Waltons & Co.*

E. C. M. T.

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THE AMAZONE.

C. A.

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Dec. 14.

Shipping—Possession of a yacht—Diplomatic immunity—Foreign military attaché—Diplomatic Privileges Act, 1708 (7 Anne, c. 12), s. 3.

The plaintiff, a married woman, issued a writ in rem claiming possession of a yacht. The writ was addressed to "the owners and the parties interested." The plaintiff's husband entered an appearance under protest as defendant and moved to set the writ aside on the grounds that he enjoyed diplomatic privilege and was immune from process, that he owned and was in possession of the yacht and was unwilling to submit to the jurisdiction of the Court.

As regards the defendant's diplomatic status, the Foreign Office certified that he was received by H.M. Government as Assistant Military Attaché to the Belgian Embassy from October 25, 1920, and that since that date his name had been included in the list prepared under the Diplomatic Privileges Act, 1708 (7 Anne, c. 12).

By s. 3 of that Act ". . . all writs and processes that shall "at any time hereafter be sued forth or prosecuted, whereby the "person of any Ambassador . . . authorized and received as "such by Her Majesty . . . or the domestick, or domestick "servant of any such Ambassador . . . may be arrested or "imprisoned, or his or their goods or chattels may be distrained, "seized, or attached, shall be deemed and adjudged to be utterly "null and void"

The yacht, which was registered in the defendant's name, was laid up at Southampton in the hands of Messrs. Thornycroft, who took their instructions from the defendant. The plaintiff's case, however, was that the yacht had been bought with her money, that everything the defendant did in connection with the yacht was done as her agent, and that unless he proved that the yacht was his property he could not claim immunity under the statute.

Langton J. set the writ aside and the plaintiff appealed :—

Held, that the defendant had possession of the yacht ; that the statute of Anne was merely declaratory of the common law, under which, as a member of an ambassador's suite, the defendant enjoyed diplomatic immunity from judicial process, whether or not he was also protected under the statute ; and that the appeal failed.

Judgment of Langton J. [1939] P. 322 affirmed.

APPEAL from a judgment of Langton J. sitting in Admiralty.

The plaintiff, Madame Una Hemeleers-Shenley, appealed against a decision that the writ for possession of the yacht *Amazone* and the warrant of arrest issued at the instance of the plaintiff must be set aside. The defendant, who had succeeded in his motion to get the proceedings set aside, was

Commandant Léon Hemeleers-Shenley, the husband of the plaintiff. The grounds of the motion were that the action impleaded the Commandant, who, as Assistant Military Attaché on the staff of H.M. the King of the Belgians in London, was immune from process, and was unwilling to submit to the jurisdiction of the Court, and that the yacht was owned by him and in his possession and control. He had entered a conditional appearance to the writ under protest.

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The facts, so far as necessary to the decision, are sufficiently set out in the headnote and will be found more fully in the judgment of Langton J. (1)

G. St. C. Pilcher K.C. and *Owen Bateson* for the appellant. The defendant claims to be the owner of the yacht, but he has not proved it and has not even proved that he has possession. Under the Diplomatic Privileges Act immunity is given against the seizure or arrest of the defendant's goods, but he must satisfy the Court that they are his goods before the immunity can be claimed. Unlike the immunity of a sovereign ruler, the immunity of an ambassador or a member of his suite is derived solely from the statute, and the certificate from the Foreign Office as to the status of the defendant, states, and states correctly, that the defendant is on the list prepared under the statute; and that is the right method of ascertaining the persons entitled to diplomatic privilege: see *Engelke v. Musmann*. (2)

[*MACKINNON L.J.* That case also shows that the statute is merely declaratory of the common law.]

[*Gordon Willmer K.C.* said that he would also refer the Court to *Parkinson v. Potter* (3) in this connection.]

A mere assertion of possession, however, is insufficient even if there be diplomatic exemption apart from the statute: see the observations of Lord Maugham in *The Cristina* (4) and of the Court of Appeal in *Haile Selassie v. Cable and Wireless, Ltd.* (5)

(1) [1939] P. 324-326.

(2) [1928] A. C. 433.

(3) (1885) 16 Q. B. D. 152.

(4) [1938] A. C. 485, 516.

(5) [1938] Ch. 839, 844.

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[Reference was also made to *Magdalena Steam Navigation Co. v. Martin* (1) and Blackstone's Commentaries, 21st ed., vol. i., pp. 254-256.]

Gordon Willmer K.C. and *G. N. W. Boyes* (for *J. V. Naisby* on active service) for the respondent were not called on.

SLESSER L.J. This is an appeal from a judgment of Langton J. arising on a motion to set aside a writ in the case of Hemeleers-Shenley, plaintiff, and all persons claiming an interest in the vessel *Amazone*, defendants, in Admiralty. Madame Hemeleers-Shenley is the wife of a gentleman who at all material times was the Assistant Military Attaché to the Belgian Embassy. It appears from the evidence on affidavit that Madame Hemeleers-Shenley was a wealthy lady, and that from time to time she assisted her husband and enabled him to live in that state of life which they thought appropriate. Among other things, it appears that he was put financially into a position to order Messrs. Thornycroft to build a yacht, the *Amazone*. This vessel was built apparently entirely to the orders of Commandant Hemeleers-Shenley; he discharged, so far as regards Messrs. Thornycroft, any financial liabilities which arose from the building of the yacht, and his name appears in the register as the owner of the boat. Nevertheless, disputes having unfortunately arisen between the husband and wife, his wife contends that she is the owner of the boat. Her writ, dated March 30, 1939, claims, as sole owner of the *Amazone*, to have possession decreed to her of the said vessel.

The learned judge has come to the conclusion that the possession of this vessel is now in the husband, and so far as that matter is concerned, I think the learned judge was right in coming to that conclusion. Indeed, it appears to be conceded by the affidavits filed on behalf of the plaintiff and is so stated in the affidavit of the husband. What is said, however, is that the husband is immune from being impleaded in this action to test whether he is or is not the owner of the *Amazone* and entitled to possession, by reason of the fact

(1) (1859) 2 El. & El. 94; 28 L. J. (Q. B.) 310.

that, as is stated by the Foreign Office, he possesses diplomatic privilege. It is said by Mr. Pilcher that the certificate of diplomatic privilege, having stated that he is Assistant Military Attaché, goes on to say that his name has been included in the list prepared under the statute of 7 Anne, c. 12 ; and it is argued—by reason of the fact that his name appears in that list and there is no statement by the Foreign Office beyond that—that if he cannot show diplomatic immunity under that statute, he cannot resist these proceedings.

In my view, that is to put an entirely too narrow construction upon the certificate of diplomatic privilege of the Foreign Office. True it is that the husband's name may be compiled under that list, but I read the certificate as informing the Court, as it so states, that he is the Assistant Military Attaché, and that he is a person having diplomatic privilege not only under the statute but also under the common law—such privilege as would normally attach to an Assistant Military Attaché. What is said by Mr. Pilcher on behalf of the appellant is that if reliance is to be placed upon the Diplomatic Privileges Act, then the language of s. 3 is not sufficient to enable the respondent here to avail himself of its protection unless he can show that the goods referred to in the action are actually his—a matter which can only be determined after the action has been heard and determined.

The statute first recites that : “Whereas several turbulent “and disorderly persons having in a most outrageous manner “insulted the person of his Excellency Andrew Artemonowitz “Mattueof, Ambassador Extraordinary of his Czarish “Majesty” Then in s. 3 appear these words : “And to “prevent the like insolences for the future, be it further “declared by the authority aforesaid, That all writs and “processes that shall at any time hereafter be sued forth “or prosecuted, whereby the person of any Ambassador, or “other publick minister of any foreign prince or state, authorized “and received as such by Her Majesty, her heirs or successors, “or the domestick, or domestick servant of any such Am- “bassador, or other publick minister, may be arrested or “imprisoned, or his or their goods or chattels may be distrained,

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C. A. "seized, or attached, shall be deemed and adjudged to be utterly
 1939 "null and void to all intents, constructions, and purposes
 "whatsoever."

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Mr. Pilcher says it has not yet been established that these are the respondent's goods or chattels, and therefore the question whether they may be "distrained, seized, or "attached"—matters prohibited by the statute—cannot be said necessarily to apply to this husband as a diplomatic servant until that matter has been litigated.

It is clear, I think, and it has been stated very clearly in earlier cases—it is not necessary to repeat it again—that 7 Anne, c. 12, was merely in the nature of a penal statute, as the preamble says, to deal with the persons who do the kind of things struck at by the preamble. In s. 4, for example, it provides for punishment of attorneys who seek to enforce process and says that they "shall suffer such pains, penalties, "and corporal punishment, as the said Lord Chancellor, "Lord Keeper, and the said Chief Justices, or any two of them, "shall judge fit to be imposed and inflicted." I do not know that any attorney has ever been corporally punished under this statute for such proceedings. It may be that in a certain view the attorneys in this case might be in peril of receiving such punishment; but we have not got to adjudicate upon that point.

This question in substance has already been considered and I think decided in the case of *Parkinson v. Potter* (1), in which it is assumed—and earlier cases have said the same thing—that this statute of Queen Anne is by no means exhaustive of the common law dealing with diplomatic immunity. In that case an action was brought on a lease against an attaché of a foreign embassy, and it was argued, rather as it is argued here, that the language of the statute was not satisfied because it was not shown that the goods were the property of the person seeking the diplomatic immunity; and that in the statute of Anne there is no mention of an attaché, which is perfectly true; it deals with the ambassador and his domestic servants. But Mathew J.,

(1) 16 Q. B. D. 152, 157.

disposing of that argument, says: "Then it was urged that, assuming that De Basto was an attaché, it did not follow that he was within the privilege of the embassy; and our attention was called to the provisions of the statute 7 Anne, c. 12, s. 3, which only mentions the ambassador and his domestic servants. But it appears from the authorities that the privilege of the embassy is recognised by the common law of England as forming a part of international law, and according to that law it is clear that all persons associated in the performance of the duties of the embassy are privileged, and that an attaché is within that privilege."

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Now, that being so, I ask myself: what is the privilege, quite apart from the statute of Anne, and how far does it extend? I think that all the textbooks and authorities agree, and I do not think it is necessary to give any very copious citations. So far as textbooks are concerned, I will content myself with quoting Dicey's *Conflict of Laws*, 5th ed., p. 196: "An ambassador or other diplomatic agent accredited to the Crown by a foreign State cannot, at any rate without his sovereign's consent, be made defendant here in an action either for breach of contract or, it would seem, for tort, nor can his property be seized." There is nothing I think, in any of the authorities to throw doubt upon that proposition except an early statement of Sir Edward Coke in his *Institutes*, which qualifies the immunity of the ambassador in a way which ever since has been disagreed with.

Finally I may mention the observations of Lord Warrington of Clyffe in *Engelke v. Musmann* (1): "I have also thought it unnecessary to say anything about the statute of Anne. It is well settled that the questions we have been discussing do not depend on the statute but are principles of common law having their origin in the idea of the comity of nations."

Mr. Pilcher is prepared to admit that, once we may travel outside the statute of Anne, subject to the doubt expressed whether this person is a diplomatic agent otherwise than for the purpose of the statute, there would be here a complete protection. Now, in this action there can be no doubt at all

C. A. that Commandant Hemeleers-Shenley, who is impleaded, is a
1939 person coming within the privilege of the embassy. Once
that is established, it follows from all the authorities from
THE Grotius downwards that he may claim his immunity.
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Slessor L.J. In my view the learned judge was right in coming to the
conclusion to which he did come. I myself express no opinion
whether the defendant is or is not protected under the
statute of Anne ; it is sufficient for my purpose to say that he
can derive his protection from the common law. I think,
therefore, this appeal fails.

MACKINNON L.J. I agree. The argument is that inasmuch
as the words of s. 3 of the Act do not exactly fit the nature of
the present action, therefore it cannot be stopped on the
application of the respondent. But it is perfectly natural
that s. 3 of the Act should have referred to the matter in the
way it does, because the normal way at that time of commencing
any civil proceeding was by arrest by way of mesne process or
by distrainment. It is plain under the authorities that the Act was
not meant to define exhaustively the nature of the diplomatic
privilege, but was merely confirmatory of the common law.
Slessor L.J. has referred to several authorities in which that
has been laid down. There is only one further case which I
think is equally clear and that is *Magdalena Steam Navigation
Co. v. Martin*. (1) In that case a similar question arose
and a kindred argument upon the terms of the statute of
Anne was addressed to the Court. Lord Campbell deals with
that and deals with the authorities, and says : "Reference
"was frequently made during the argument to the statute of
"7 Anne, c. 12 ; but it can be of no service to the plaintiffs."
Then he discusses that, and says : "At any rate, it never was
"intended by this statute to abridge the immunity which the
"law of nations gives to ambassadors, that they shall not be
"impleaded in the courts of the country to which they are
"accredited." That is repeated in the last sentence of his
judgment : "It certainly has not hitherto been expressly
"decided, that a public minister duly accredited to the Queen

(1) 28 L. J. (Q. B.) 310, 315.

“by a foreign state is privileged from all liability to be sued
 “here in civil actions ; but we think that this follows from
 “well-established principles, and we give judgment for the
 “defendant.”

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I agree with that ; I think this appeal is quite unfounded, and it should be dismissed with costs. MacKinnon L.J.

GODDARD L.J. I agree. It is well established that it is the common law of this country that not only ambassadors but members of their suites are exempt from judicial process. The statute of Anne is declaratory in the first, second and third sections, and it really does not achieve any change in the law by the subsequent sections. It is not a change in the law, but an addition to the law, for s. 4 imposes penalties on attorneys, solicitors, sheriffs, bailiffs, and other ministers of justice who issue or execute writs against the person of the ambassador or his suite. Then s. 5 provides that persons subject to the bankruptcy laws who put themselves into the service of any such ambassador or public minister should not take any manner of benefit by this Act—referring, that is, to traders. That may or may not mean that if a trader attached himself to the suite of an ambassador he should not have any immunity ; but I think it clearly means that a solicitor who sued a person within the description of s. 5 would not be liable to any pains and penalties under s. 4. Sect. 5 of the Act gives immunity also to a solicitor who sues a person not on what is commonly called the diplomatic list ; it provides that “no
 “person shall be proceeded against as having arrested the
 “servant of an ambassador or publick minister, by virtue of
 “this Act, unless the name of such servant be first registered
 “in the office of one of the principal secretaries of state, and
 “by such secretary transmitted to the sheriffs of London and
 “Middlesex . . .” This is a striking instance of the inaccuracy of a marginal note, because the marginal note says that :
 “No merchant &c. to have any benefit of this Act ; nor the
 “servant of an ambassador, unless his name be registered
 “&c.” That is not what the section provides ; it says that solicitors and others are not to be liable to penalties for

C. A. proceeding against servants of an ambassador who are not
1939 registered ; and it has since been held that though a servant
is not registered, he may yet have diplomatic privilege.

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I agree with MacKinnon L.J. that in the time of Queen Anne all common law actions which were started in the Queen's Bench by writ of latitat, or in the Common Pleas by a writ of capias, or by similar processes in the Court of Exchequer, contemplated the arrest on mesne process of the defendant, or, if that could not be effected, a writ of distringas on his goods to compel him to put in an appearance ; and, therefore, that those common law processes were dealt with by s. 3 was no more than logical. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant : *Janson, Cobb, Pearson & Co.*

Solicitors for the respondent : *Stephenson, Harwood & Tatham.*

E. C. M. T.

Distinguished. HOPES v. HOPES.
[1948] 2 All E.R. 920.

Distinguished. HOPES
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[1949] P. 227

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Divorce—Desertion—Husband's withdrawal from cohabitation—Spouses living in same house on separate floors—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 176 (b), as amended by Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), s. 2.

Where a married couple lived for years in different parts of the same house after the husband had withdrawn from cohabitation with his wife and ceased to have anything to do with her at all except to deposit small sums of money from time to time where she could pick them up, it was held on the wife's petition for divorce that he had deserted her for upwards of three years immediately preceding the petition.

WIFE'S PETITION for divorce on the ground of desertion.

The marriage took place in September, 1922. The wife prayed in February, 1938, for the dissolution of her marriage on the ground of desertion for at least three years immediately preceding the presentation of the petition. The evidence showed that the husband in 1925 withdrew from cohabitation with his wife despite her remonstrances and, apart from his allowing his wife 1l. a week for over eight years, they lived under the same roof as strangers. In 1933 he stopped payments and the wife summoned him for wilful neglect to maintain. The summons was dismissed, and the magistrates suggested a reconciliation, but the husband persisted in living apart from his wife in the same circumstances up to the date of the petition. Though the respondent filed an answer denying the charges, he did not contest the petition further.

The President invited the assistance of the King's Proctor on the question whether or not the parties' living under the same roof barred desertion.

The facts are contained and the authorities reviewed in the judgment.

B. Stuart Horner for the petitioner.

S. E. Karminski for the King's Proctor.



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1939. Oct. 27. THE PRESIDENT (SIR BOYD MERRIMAN). I think perhaps I ought to say a word about this case because it was one about which I felt some difficulty when the case came on in the first instance, and for that reason I adjourned it to enable the papers to be sent to the King's Proctor in order that he might investigate the matter and assist the Court. The result of that has been that, not for the first time by any means, the King's Proctor has been of the greatest possible assistance, and the facts have been fully investigated. I am now satisfied I have got full information on every material fact, and, in addition to that, I have been greatly assisted by Mr. Karminski's argument on the law affecting the matter.

The parties were married in 1922, but owing to quarrels which broke out between them (which for the purposes of this case I am quite prepared to assume were not caused by the fault of the husband alone) there came a moment when the quarrels became so acute that the husband withdrew from cohabitation with his wife. At that time they were living in a house which belonged, I understand, to the husband, the whole basement of which was occupied by the husband's mother. After this particular quarrel, when matters came to a head, the husband left his wife's bedroom and actually made his home with his mother, that is to say he lived in the basement, though he slept with his son, the son of the first marriage, as I understand it, on the first floor, leaving his wife in possession of the ground floor.

There was no physical separation between these parts of the house, but from that time onwards it was impossible in any real sense of the word to describe the husband as living with his wife; the truth of the matter was he was living with his mother who inhabited the basement of the house. He neither expected nor desired, according to his own evidence, any services from his wife, but did allow her, and continued to pay for over eight and a half years thereafter, the sum of a pound a week. Now it is said that he was in desertion during that time, and that allegation was based on the fact that after this quarrel the respective mothers intervened and the wife said she was prepared to give him another chance, and the husband

said that he had finished with her and thereupon went, as I have already said, to live in his mother's part of the house.

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If the matter stood there I should be doubtful whether it could fairly be said, having regard to the way in which this arrangement went on without intervention for eight years and a half, the wife had made out a charge of desertion during that time. However that may be, I am not called upon to decide that. It is indisputable that the circumstances in which that state of things came about are relevant in considering the point I have really to decide, whether there was desertion for the three years immediately preceding the presentation of the petition.

Now I come to the difficulty which really was raised, and which has now been satisfactorily explained. For some reason or another, which is not very clear, the husband in the summer of 1933 suddenly stopped these payments which had been going on for eight and a half years. Thereupon the wife, not unnaturally, took out a summons against him for wilful neglect to maintain. This came on before the magistrates, and the wife was examined and cross-examined. The husband made out a case that he had withheld the payment because in effect his wife was rendering him no services for this. The magistrates dismissed the complaint on the merits. That unquestionably was an awkward fact, having regard to the wife's present case that thereafter her husband was deserting her.

I need say no more about the magistrates' decision than this, that the husband now admits there never was any arrangement whatever that the wife should render services for this pound. The only thing that had happened was that his mother had died sometime at the end of 1932, and that it pleased him to think that after that, although the wife was engaged in keeping herself and earning her living, she should come and look after him and minister to him for this same pound a week, not making any suggestion whatever that she should be paid anything additional for her services. Now he admitted in the witness box it never occurred to him she had a point of view in the matter. However, the magistrates dismissed the case

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and if the matter had stood there it would obviously be very difficult for her to maintain this case of desertion, having regard to that finding. But it is now common ground that after they had disposed of the case the magistrates suggested, very wisely, that it should be possible for these people to be reconciled, and, therefore, they both went, at the magistrates' suggestion, to see the probation officer. Now the wife gave some evidence about that—not very full—and it was left in some doubt how the matter really stood, but as the result of the investigations which have since taken place it is now quite clear what happened was this: the probation officer tried to effect a reconciliation; the wife said that she was ready and willing to make a fresh start; the husband made it equally clear that he was not willing to take his wife back. He said to the probation officer, as he said to me, that it would be no good at all, and he made it clear that he was not willing to make a fresh start. The probation officer was not satisfied with this and tried to persuade him that he ought to make an effort. The matter was finally left that he would think it over and would telephone to the probation officer next day. He never did telephone, and in effect maintained, as he maintains now, that no good would have come of attempting a reconciliation and persisted in withholding from cohabitation with his wife.

Now that, Mr. Horner says, and I think says truly, coupled with the earlier history, does afford a starting point for this charge of desertion. It is true that after this abortive interview with the probation officer things went on, so far as the living accommodation was concerned, exactly as they had been before, save only for this, that the husband's mother being dead there was no question of his living with her, but equally he continued to live in the same circumstances, that is to say, in the part of the house which had been occupied by the mother, and the wife continued to occupy by herself the first floor of the house.

I am satisfied also by the wife's evidence that though payments on a different basis were made and continued right up to the filing of this petition there was no agreement or arrangement

for the separation. He just announced that he was going to give her 5s. or 10s. as the case might be, and put that money in some place where she could pick it up without any word being said between them, and she just had to take it or leave it; she had no option in the matter. I entirely accept her evidence in that respect.

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That being so, it seems to me that she makes out a case for desertion provided that the circumstances under which they were living are not such as to preclude her from saying that her husband had deserted her, I mean the physical circumstances. I have considered the cases to which Mr. Karminski has called my attention; *Wily v. Wily* (1), *Powell v. Powell* (2) and *Jackson v. Jackson*. (3) *Wily v. Wily* (1) was a restitution suit in which the husband by letter had refused to give his wife any more in the way of matrimonial cohabitation than the husband has afforded in this case. He said in terms that though he would give the shelter and protection of his home he would not under any circumstances cohabit on the terms of their earlier married life. She might have her room without the slightest molestation, but he must be immune from any molestation from her. In the witness box he went much further, he said he was willing to live with the petitioner and treat her as his wife, though he had no affection for her, and it goes without saying that no order of the Court could compel the rendering of marital rights. Hill J. drew the plainest possible distinction between the state of things which the husband was offering in the witness box and that which he had offered by letter. That which had been offered by letter was, he thought, a refusal of conjugal rights, therefore he made a decree for restitution.

I need not refer in detail to *Jackson v. Jackson* (3) beyond saying it is a case in which Lord Merrivale described the parties as living together in every other sense of the word except that the husband had refused conjugal rights. In that case Hill J. in recalling his decision in *Wily v. Wily* (1), referred also to a decision in *Driver v. Driver* (4), which has

(1) [1918] P. 1.

(2) [1922] P. 278.

(3) [1924] P. 19.

(4) Unreported.

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never been reported. That case I think is interesting and helpful in deciding the present case. It was a case in which it was necessary to prove desertion for the whole period of two years, for only one year and ten months of which had the husband actually lived away from his wife in circumstances which plainly amounted to desertion. But it was shown that in the first two months of the material two years he had insisted on sleeping in a separate room, had never spoken to the wife, had never answered her when she spoke to him, and when she had asked why she was being so treated had knocked her down. In those circumstances Hill J. found no difficulty in holding, although they were in one sense of the word living together during those two months, that that period could be counted as part of the material period of two years.

At the other end of the scale one has the case of *Powell v. Powell*. (1) In that case, though the parties were living actually under the same roof, they were living physically in separate tenements with separate entrances, and the husband was threatening to set up a separate establishment with another woman in the part of the house into which he had separated himself in the fullest sense of the word from his wife. That particular element is lacking in this case. On the one hand it is quite impossible to describe these people as living together in the sense in which Lord Merrivale used that phrase in *Jackson v. Jackson* (2), that is to say in every respect except the withdrawing of sexual intercourse. On the other hand, as I have said, the element that they were living in establishments which were physically separate is lacking.

I have come to the conclusion that this case is on what I may call the *Powell v. Powell* (1) side of the line rather than the *Jackson v. Jackson* (2) side of the line, and that in circumstances in which it is impossible to describe the parties as living together—indeed where the only element of living together is that they were actually residing in one house, though there was no physical separation between the parts of the house in which they were living—the case is one of

(1) [1922] P. 278.

(2) [1924] P. 19.

desertion and is not one in which the wife is precluded from asserting desertion by the mere fact that they were residing in the same house. It is only because the mother had died in 1932 that at the material time it ceased to be true to say the husband was living with the mother and not with the wife. In all other essential respects he was living separate and apart from his wife in the years 1936, 1937 and 1938, as he had been doing before his mother died. For these reasons I think the wife has made out her case and I pronounce a decree nisi with costs.

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Solicitors : *Edgar H. Hiscocks ; the King's Proctor.*

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Dec. 12.

HALL v. HALL (BY HIS GUARDIAN).

Divorce—Wife's petition—Husband's alleged insanity—Care and treatment—Irregular detention—Defect in formalities of reception into one institution from another—Five years' period of detention broken—Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), ss. 2, 3—Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 25.

On a wife's petition for dissolution of marriage presented on the ground that her husband was incurably of unsound mind and had been under care and treatment as such for at least five years immediately preceding the presentation of the petition, it was established that there had been an inadvertent breach of the conditions laid down by s. 25 of the Lunacy Act, 1890, for the transfer of a patient from a mental hospital to a workhouse :—

Held, that as the second condition under the section was not fulfilled the discharge of the respondent from the mental home in which he was originally detained operated to bring the reception order to an end ; and as the date of that discharge was within the five years immediately preceding the petition it was impossible to find that the respondent was continuously detained during that period in pursuance of any order under the Lunacy Act, 1890. Therefore the wife's plea failed.

WIFE'S PETITION for divorce on the ground of the husband's incurable unsoundness of mind.

The petition was presented in October, 1938, and sought the exercise of the Court's discretion.

The respondent, who was incurably of unsound mind, was received as a rate-aided patient into the Banstead Mental Hospital on May 13, 1927. He was discharged, apparently under s. 25 of the Lunacy Act, 1890, in November, 1934, and was, without further order, admitted to the Leavesden Mental Hospital, Abbots Langley, Hertfordshire. The latter institution was formerly the workhouse.

On behalf of the Official Solicitor as guardian ad litem it was submitted that by reason of informality in regard to the discharge there had been a break in the requisite five years of care and treatment immediately preceding the petition.

Leslie Brooks for the petitioner.

Ormrod for the guardian ad litem.

The material facts and sections of the statutes are reviewed in the judgment.

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1939. Dec. 12. THE PRESIDENT (SIR BOYD MERRIMAN). This was a wife's petition, originally based solely on the ground that her husband was incurably of unsound mind and had been detained for the statutory period under the provisions of the Lunacy Acts. There was the clearest possible evidence that he was of unsound mind and that there was no hope whatever of his recovery, but when the documents relating to the detention of the husband came to be looked at, it appeared that he, being a rate-aided patient who had been received into the Banstead Mental Hospital on May 13, 1927, and was discharged relieved under s. 25 of the Lunacy Act, 1890, was on November 21, 1934, admitted to the Leavesden Mental Hospital, Abbots Langley, Hertfordshire. As that certificate shows, the discharge purported to be made under s. 25. I was informed that what was called the Leavesden Mental Hospital was, in fact, an institution which had formerly borne the name of the Leavesden Workhouse, and s. 25 enables pauper lunatics to be discharged "not recovered" to a workhouse, but only on certain conditions: that the medical officer in the institution in which he is detained under the reception order is of opinion that the lunatic is not recovered and is a proper person to be kept in a workhouse as a lunatic, and certifies such opinion. That condition, I think, was fulfilled in this case.

The section goes on that a lunatic may thereupon be received and detained against his will in a workhouse without further order, if the medical officer of the workhouse certifies, in writing, that the accommodation in the workhouse is sufficient for the lunatic's proper care and treatment separate from the inmates of the workhouse not lunatics, or that the lunatic's condition is such that it is not necessary for the convenience of the lunatic, or of the other inmates, that he should be kept separate. It will be seen, therefore, that unless this second condition is fulfilled, there would be no authority for receiving and detaining a lunatic in the workhouse without further order;

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in other words, the discharge from the mental institution would operate to bring the reception order to an end.

Accordingly, I adjourned the case to enable the parties to make further inquiry whether the second condition had been fulfilled or not, there being on the face of the documents no evidence whatever that it had been so fulfilled. Mr. Brooks now tells me that he is unable to satisfy that condition, and Mr. Ormrod appearing for the Official Solicitor, who is the guardian ad litem, carries the matter further by telling me that the London County Council, who happen to be the authority concerned, have been communicated with and are unable to produce any evidence that this condition was ever complied with.

That being so, it is quite clear that it is impossible for me to find that this particular husband was for the period of at least five years immediately preceding the presentation of the petition—for this discharge occurred within those five years—detained in pursuance of any order under the Lunacy Acts, 1890.

I only wish to add one word. Counsel in the course of the discussion used the phrase that it was merely a technical point. Persons detained under the Lunacy Acts are detained against their will, in their own interests and in that of the public, but upon certain statutory conditions which must be strictly fulfilled, and I do not regard it as a mere technicality that those instructions should be strictly fulfilled. Similarly, under the Matrimonial Causes Act, however clearly it is proved that a person is of hopelessly unsound mind, and for however long a spouse may have been of hopelessly unsound mind, for the purpose of obtaining a decree of divorce it is necessary to prove that he or she has been continuously under care and treatment for the statutory period, and care and treatment is defined, so far as this case is concerned, as meaning that a spouse is detained in pursuance of an order under the Lunacy Acts, 1890 to 1930, and not otherwise; so there again there is no room for any latitude of interpretation. The statute must be strictly complied with. In that sense, and in that sense only is it permissible to use the phrase that it is a technical point

that is involved. What is really involved is strict compliance with two statutes, at which I am obliged by law to look.

[Leave having been given to amend the petition by adding a charge of cruelty committed long before the respondent's certification, the President pronounced a decree nisi on that ground in the exercise of the discretion.]

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Solicitors : *Stanley Attenborough & Co. ; the Official Solicitor.*

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NASH OTHERWISE LISTER v. NASH.

Nullity of marriage—Wife petitioner's alternative pleas of impotence and wilful refusal to consummate—Defence of insincerity—Real issue—Principles to be applied—Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), s. 701.

Where in a suit for nullity on the ground of impotence or wilful refusal to consummate, the respondent pleads lack of sincerity by the petitioner in presenting the petition, the insincerity with which the Court is concerned as a possible bar to the remedy sought has reference to the plea, and not to the character of the petitioner, nor to the petitioner's conduct before marriage, nor to the motives which prompted the petitioner to enter into the marriage.

Where a wife presented a petition for nullity within three months of the marriage ceremony and the respondent pleaded insincerity on her part, it was held that as the petitioner had done nothing to approbate the marriage and had obtained none of the benefits, material or otherwise, which a woman had a right to look for in marriage the continued acceptance of which might properly disqualify her from claiming its avoidance, the plea of insincerity failed.

PETITION for nullity on the alternative grounds of incapacity and wilful refusal to consummate.

This was the petition of a wife for a declaration of nullity of marriage. The respondent denied the allegations and in his defence said that there was want of sincerity by the petitioner in presenting her petition.

The ceremony of marriage took place on January 18, 1939, at All Souls' Church, Marylebone. The petitioner was aged thirty-four years, and was secretary to the respondent, then aged seventy-four years. The petitioner left the respondent on March 1, 1939, and presented her petition four days later.

Gerald Gardiner for the petitioner.

R. A. L. Hillard for the respondent.

The facts and arguments are reviewed in the judgment.

1939. Dec. 21. LANGTON J. In this case Mrs. Nash asks for a decree of nullity on the ground that her marriage has never been consummated by reason of the impotency of her husband, or alternatively by reason of his wilful refusal to

consummate the marriage. By his answer delivered on March 9, 1939, the respondent, Mr. Nash, denied his incapacity, and also the refusal to consummate. Some months afterwards, on June 16, 1939, this answer was amended to include the plea that the petitioner was guilty of want of sincerity in presenting the petition.

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As to the first two issues of impotency and wilful refusal, it will not be necessary for me to give a judgment in great detail. It will be necessary hereafter for me to say something concerning the medical evidence touching on Mr. Nash's sexual capacity, but since he admitted at the trial, first, that he had in fact never consummated the marriage, and secondly, that he had not the slightest intention of doing so after the first week of the marriage had elapsed, his counsel, Mr. Hillard, considered that it was unnecessary to debate that aspect of the matter any further.

The great bulk of the time which this case has occupied has been devoted to the unusual question of want of sincerity on the part of the petitioner, and this is now the only outstanding issue in the case.

Extremely elaborate particulars were delivered by the respondent "of facts and declarations relied upon" to justify this issue. I do not think that it would serve any useful purpose for me to attempt to recapitulate all these alleged facts or to announce a determination upon all the minor issues raised thereby. The first thing which appears to me to be necessary, and it is by far the most difficult part of my task, is to attempt to focus this issue as nearly as may be, and to delimit in a proper perspective the nature and bounds of the issue itself.

The authority relied upon by both sides as being not only the locus classicus of the doctrine to be applied, but also the alpha and omega of the doctrine itself, is the case of *G. v. M.* (1) In that case Lord Selborne L.C. used the following language: "My own belief is that, to whatever criticism the phraseology of learned judges in those cases may be open (and I must say that the adoption of that

(1) (1885) 10 App. Cas. 171, 186.

1939 "particular phrase 'sincerity' seems, as the learned counsel
 NASH "said, to suggest a psychological question rather than one
 OTHER WISE "of law or fact, diving into the motives of a person's mind
 LISTER "rather than trying whether a cause of action exists or not),
 v. "I think I can perceive that the real basis of reasoning which
 NASH. "underlies that phraseology is this, and nothing more than
 Langton J. "this, that there may be conduct on the part of the person
 "seeking this remedy which ought to estop that person from
 "having it ; as, for instance, any act from which the inference
 "ought to be drawn that during the antecedent time the
 "party has, with a knowledge of the facts and of the law,
 "approved the marriage which he or she afterwards seeks
 "to get rid of, or has taken advantages and derived benefits
 "from the matrimonial relation which it would be unfair
 "and inequitable to permit him or her, after having received
 "them, to treat as if no such relation had ever existed. Well
 "now, that explanation can be referred to known principles
 "of equitable, and, I may say, of general jurisprudence.
 "The circumstances which may justify it are various, and in
 "cases of this kind many sorts of conduct might exist : taking
 "pecuniary benefits for example, living for a long time together
 "in the same house or family with the status and character
 "of husband and wife, after knowledge of everything which
 "it is material to know. I do not at all mean to say that
 "there may not be other circumstances which would produce
 "the same effect ; but it appears to me that, in
 "order to justify any such doctrine as that which has been
 "insisted upon at the bar, there must be a foundation of
 "substantial justice, depending upon the acts and conduct
 "of the party sought to be barred."

Lord Watson (1) puts forward his view of the matter as follows : "The first plea against any consideration of the
 "merits of this case was rested upon the rule as to 'sincerity,'
 "or more correctly speaking, insincerity. I agree with the
 "observations which have been made upon the English cases
 "bearing upon that matter by my noble and learned friend
 "the Lord Chancellor. It humbly appears to me that the

"expression is not a very happy one, and also that it has
 "been used occasionally in circumstances which render it still
 "more inappropriate. I think that when those cases are
 "dissected they do show the existence of this rule in the law
 "of England, that in a suit for nullity of marriage there may
 "be facts and circumstances proved which so plainly imply,
 "on the part of the complaining spouse, a recognition of the
 "existence and validity of the marriage, as to render it most
 "inequitable and contrary to public policy that he or she should
 "be permitted to go on to challenge it with effect."

Lord Bramwell (1) analyses the use of the expression
 "sincerity" with considerable care. "Now, one word as to
 "this question of 'sincerity.' It is a most remarkable
 "expression, a very curious word, and I am not at all sure
 "that it has not resulted from this, that sincerity is a very
 "important matter in ascertaining whether the spouse com-
 "plained of is impotent or not, and sincerity has been dwelt
 "upon for that purpose till at last it has been taken to be a
 "separate head of objection to the complaining party's
 "proceedings. It seems to me very strange. What the
 "complainant does in a suit of this sort is to come to the
 "appropriate Court for a declaration of the truth: 'I say
 "'that this man is impotent and was so at the time of the
 "'marriage and I ask you to declare that fact.' The very
 "words of the summons are, 'Declare the truth, that this
 "'man was impotent when he married me.' The Court say,
 "'No, we will not,' or the argument is that the Court ought
 "to say, 'No we will not—we know that it is true, but we
 "'will not say so'—why? In my opinion a man who has
 "inflicted this cruel wrong upon a woman ought not to be
 "heard to object to her complaining, when she comes forward
 "with her complaint of this wrong that he has done her,
 "unless in some way or another he can shew that he sustains
 "some injury from the double matter of her not having
 "complained earlier, and of her complaining now. In such a
 "case I should indeed think that a law might be made
 "(perhaps it exists, for aught I know), that in some way or

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“another the declaration of the truth should be accompanied
“by some compensation to him for the sort of injury which,
“as I have indicated, might have been done to him.”

It is worthy of remark that although in that case the parties were together after marriage for the better part of two years, and although the wife never raised the question of the impotency until after she had herself given birth to an illegitimate child, and been charged with adultery by her husband, the House of Lords did not find that her plea was tainted by insincerity. It is also worthy of note that none of the learned lords from whom I have quoted seem to be altogether satisfied with the use made in this connection of the term “sincerity.” It is, I think, clear that their Lordships are of opinion that the word should not be held to be employed with all its usual implications, but should be treated as having a special and limited meaning.

Mr. Hillard placed great reliance upon the modern case tried in Scotland in the year 1931 reported under the title of *Mrs. M. L. v. E. L.* (1) The headnote of the case states both the facts and the findings with commendable terseness and accuracy. As to this case it should be observed that the parties had lived together for over four years before any action was taken by the pursuer, and that two out of the three judges in the Court of Session reserved their view as to whether knowledge of impotency prior to the marriage in all cases necessarily operates as a bar to an action for nullity.

The view which I have formed from a consideration of these and other cases bearing on the point, is that the “sincerity” with which the Court is concerned has reference only to the sincerity of the plea, and has nothing whatever to do with either (a) the general character of the petitioner as a sincere or insincere person, or (b) with the conduct of the petitioner before her marriage or the motives which prompted her to enter into the marriage. In cases of the class to which *M. L. v. E. L.* (1) belongs, namely, cases in which the petitioner knew of the impotency before marriage, the knowledge is obviously of great importance

(1) 1931 S. C. 477.

as shedding light upon the sincerity of the plea and not the sincerity of the petitioner's conduct. To put the matter in another way, the Court may well believe that a plea of this kind is not put forward with sincerity in a case where the petitioner knew of the disability in advance, but the decree will be refused not because of the petitioner's knowledge, but because of the insincerity of the petitioner's plea. Knowledge in such cases is only matter of evidence, it is not an acid test of sincerity.

The task before me is accordingly to address my mind not to the conduct or declarations of Mrs. Nash before her marriage, but to the question whether, since her marriage, she has, in the words of Lord Selborne, "been guilty of any conduct which ought to estop her from having the remedy she seeks," or to quote again, "is there any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which she now seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit her, after having received them, to treat as if no such relation had ever existed."

Be it observed that the Lord Chancellor speaks of "an act" "during the antecedent time." As I read this passage, and indeed as I understand the law, the antecedent time here referred to is the time which elapses between the date of the marriage and due ascertainment of the facts and the law, on the one hand, and the date when the plea is put forward, on the other.

In the present case it has never been suggested, and indeed could not be suggested, since Mr. Nash does not even now acknowledge his impotency, that Mrs. Nash had any knowledge one way or the other concerning her husband's capacity before marriage. To my thinking, therefore, the point from which Mrs. Nash's conduct falls to be examined commences from the time when she herself became convinced that her husband was impotent. In order to ascertain this moment

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with reasonable precision it will be necessary to enter somewhat more exhaustively upon certain questions of fact.

The parties met in December, 1938. The petitioner was then a young woman of thirty-four years of age, and the respondent an old man of seventy-three years of age.

[The learned judge then dealt with the facts leading up to the marriage, which he held to be irrelevant to the issue, and thereafter proceeded to deal with the relevant facts as follows:]

On January 18, 1939, the parties were married and started upon a somewhat curious honeymoon, of which they spent one night at Newbury, and three at Weston-super-Mare. The accounts given by the two parties as to the attempts made to consummate the marriage vary considerably. The petitioner gave detailed evidence as to five or six attempts, but the respondent roundly asserted that there were only two. So far as their capacity as witnesses is concerned, neither has struck me as being conspicuously lacking in frankness, but where a matter of recollection is in issue, I greatly prefer the younger, fresher, and far clearer memory of the petitioner to the hazy and fuddled recollection of Mr. Nash. Mr. Nash's idea of giving evidence is to say first whatever he chooses to say at the moment, and then to prune it down as recollection returns to him and reminds him of the true facts. This method, or lack of method, has the enormous disadvantage of a great waste of time, and the obvious defect that the pruning process is apt to be imperfect.

In the matter of attempts, therefore, I accept the petitioner's account and believe that Mr. Nash made five or six attempts before he finally desisted. It is quite in character and in keeping with the incredible arrogance of his attitude towards women that he gave as his reason for desisting that he did not wish to have children by the petitioner. I do not for one moment believe that this was the real reason why he desisted. Similarly I dismiss his repeated asseverations before me that he had formed the view that it was wrong for a man of his age to procreate children as a mere piece of hypocritical humbug. In my judgment Mr. Nash left off attempting to

have relations with his wife because he felt that he was incapable of performing the sexual act.

As to whether his belief was well founded in truth, it is not important for me to determine this question for the reasons which I have given above. Dr. Milligan, whose experience in these matters is immense, tells me that he has very little doubt in all the circumstances that Mr. Nash is impotent. The condition of his testicles is atrophic, and there is practically no sensation. Dr. Heneghan, on the other hand, attempted, as it seemed to me, a rather forlorn defence of Mr. Nash's potency, and said that if he were given complete rest in bed there was a chance that he might be able to accomplish copulation. He admitted, however, that he would not be prepared to risk his professional reputation upon the success of the experiment he proposed. To my mind this last sentence from Dr. Heneghan was the wisest part of his evidence, and if it were necessary for me to arrive at a determination, I do not think that the matter would cause me prolonged hesitation.

Almost from the outset the marriage proceeded upon most unusual lines. As early as January 26, Mr. Nash began to deliver communications to his wife which he described in the witness box as "ultimatums." It is not a little remarkable, in view of the defences which he has seen fit to put forward in this case, that in the first of these documents he writes as follows: "You can get the marriage annulled." His explanation of what he really meant by this phrase was, as usual, not very clear, but he did not deny that he was there referring to the fact that the marriage had not been consummated, and that he intended to convey that if a petition was presented by his wife he would not defend the suit. Since he is in the habit of changing his mind for no apparent reason upon most of the determinations at which he has arrived, it is not surprising that he has made his present volte face on this subject by defending this suit. It seems to me, however, that in considering the sincerity of the petitioner's plea it is not unimportant to observe that within eight days of the

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marriage the respondent was inviting her in writing to take the very course which she shortly afterwards pursued.

The same communication of January 26 contains also the following sentence: "I am bound to keep my adopted "daughter." The passage refers to a young woman whose real name is apparently Joan McGlyn, but whom the respondent has adopted in a form of law which has in fact no legal effect, since the young lady had already attained her majority before the act of adoption. The respondent made no secret of the fact that he had proposed to and at one time ardently desired to marry this young lady. I gather that she is sometimes known as Miss McGlyn-Nash, and about the time when the respondent became engaged to the petitioner she reappeared at the respondent's flat, and resumed her somewhat ill-defined position as an adopted daughter. Miss McGlyn or McGlyn-Nash, if that be her proper name, was not called before me, and I would not wish that anything contained in this judgment should seem to be a reflection upon either her conduct or her character. It is sufficient for present purposes to say that her continued presence at the respondent's flat after the marriage did nothing to assist the harmony of that ill-assorted union. After an uneasy month of bickering and unhappiness, punctuated by frequent and contradictory ultimatums by the respondent to the petitioner, the petitioner left the respondent on February 25, 1939. She left behind her a note, the essential part of which is as follows: "You have made my life such "a hell that I am leaving you for good. You will hear from "my solicitors."

I do not imagine that it is a matter of much importance to attempt to discover what was the final or culminating incident of disagreement which prompted the petitioner's action in leaving the respondent. The petitioner claimed that she was driven thereto by a most unreasonable and degrading proposal that the matrimonial home should be transferred to Ramsgate in intolerable conditions. She said that the conditions were that she was to go to Ramsgate in company with Mr. Nash and Miss McGlyn, and that whilst Mr. Nash was to occupy one flat, Miss McGlyn and herself

were to occupy another. If, as I understand to be the case, she had neither sympathy nor friendliness for Miss McGlyn, and had never been led to understand that when she married Mr. Nash, Miss McGlyn would form a permanent part of his household, her determined objection to the Ramsgate project is in every way comprehensible.

Mr. Nash's explanation of the project was somewhat different, but his memory is so unreliable that he has possibly forgotten the details, and in any event his view as to the consideration due to his wife was so unusual that the suggestion put forward by the petitioner does not appear to me to be in any degree unlikely. I am sure that Mr. Nash would have considered his own interests and convenience alone, and would not have been deterred from making or diverted from pursuing any project he favoured because it happened to be objectionable to his wife. Within four days of leaving her husband, namely, on March 1, 1939, the petitioner filed her suit for nullity against her husband. If ever, therefore, there was a case in which "delay" in putting forward her plea was reduced to a minimum it is this case.

Returning now to a consideration of the legal aspect of the plea of "insincerity," it will be remembered that in nearly every case where this plea has been judicially considered, delay in putting it forward has been the basis upon which its sincerity has been attacked. The limitation upon the ordinary meaning of the word "sincerity," to which I have alluded above, seems, therefore, to be fairly clearly defined. The petitioner must be sincere in the sense of not having wavered in her view as to the action she will take to assert her rights after she attained full knowledge of the facts and the law concerning those rights. The Court will not allow a petitioner, after attaining such knowledge to approbate the contract of marriage and obtain rights and benefits thereunder for a term of years, and then subsequently reprobate the contract and claim that it is void upon the strength of those very rights which she has long elected to ignore.

Upon this view of the law the Scotch case of *M. L. v. E. L.* (1)

(1) 1931 S. C. 477.

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appears to fall in direct line with the earlier decision of the House of Lords of *G. v. M.* (1), and the only reason why the antecedent period, of which Lord Selborne speaks, was in that case antedated to include a period before the marriage, was by reason of the unusual feature of the petitioner's knowledge of incapacity before the celebration of the marriage. Applying the law, therefore, as I understand it, to this case, the point of time at and from which the petitioner's "sincerity" is to be judged, is such point of time as she obtained knowledge of her husband's incapacity, and a corresponding knowledge of the right in law which that incapacity allowed her to exercise.

The petitioner in this case was in no sense an ingenuous person. It is accordingly fair to suppose that after a week of unavailing efforts she came to a pretty clear conclusion that her husband was impotent. Nor do I imagine that at the time when she came to this conclusion, or at least a day or two after, when she received the first of Mr. Nash's ultimatums, she had any longer any doubt as to her legal position. That she should have thereafter attempted for the better part of a month to make something out of her married life does not appear to me to militate in any way against the "sincerity" of her plea.

In order to understand this aspect of the matter it is perhaps necessary to dwell for a moment or two upon the respective characters of the parties to the suit. I have already said enough concerning Mr. Nash to make it clear that he is a most unruly, ungovernable, and egotistical individual. In spite of forty years' practice as a solicitor, he proved a garrulous and most unsatisfactory witness. His volubility is only equalled by his volatility, he loves publicity and luxuriates in litigation, but his abiding interests in life are his health, his money and himself.

The petitioner is a woman of great self-possession and fair intelligence. I do not for a moment suppose that she married the respondent under the spell of any particular illusion. He had, however, I think succeeded in concealing from her the

more objectionable sides of his character and the harsher aspects of his egotism. She must have known on January 18, 1939, that she was throwing in her lot with an eccentric old man who might possibly prove both difficult and tiresome. On the other hand she was a person whose lines had not fallen in pleasant places, and who had probably come to feel that she could not expect the best things in marriage.

Calculating, however, that the second best in a hard world might be better than the kind of single life she was pursuing, she married Mr. Nash, as she herself said in answer to the first question put to her in cross-examination: "Because 'I was very fond of him and wanted children and a home.'" She could not, of course, know that the question which provoked that answer "Why did you marry Mr. Nash?" was going to be put to her at that moment and in that way and her reply was prompt and apparently uncalculated. If I were called upon to appraise the exact value of her answer, I should be strongly inclined to think that the attraction of a home ought to have come first, that she was seeking security rather than specially fond of Mr. Nash, and that the idea of children was one which she was ready to tolerate rather than a matter of active desire.

On the whole, however, having seen her for many hours in the witness box and under a cross-examination which lacked nothing in length and in detail, I have come to the conclusion that the answer which I have quoted was in the main truthful. Even upon the topic of children it is clear that it is not untruthful. It is conceded that she mentioned this subject before marriage, and that no form of contraceptive was ever suggested or employed during Mr. Nash's attempts to consummate the marriage. The fact that she was in no way unwilling to have children militated very strongly to my mind against the repeated suggestion that she was insincere because she married Mr. Nash for pecuniary advantage.

If, therefore, I had to determine whether, in her motives for marrying, the petitioner was guilty of "insincerity," I should not feel justified in arriving at any such conclusion against her. For the reasons I have given, however, I do not

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think that the issue of "sincerity," when properly delimited and understood, has anything to do with her motives for marriage.

Judging the matter from what I conceive to be the proper legal standpoint, Mrs. Nash does not appear to me to be in any manner or degree lacking in the necessary sincerity. There has been no kind of delay in presenting her petition. She has done nothing that I can see to approbate this marriage. She has obtained none of the benefits, material or otherwise, which a woman has a right to look for in marriage, and the continued acceptance of which may properly be held to disqualify her from claiming its avoidance. Accordingly Mr. Nash's defence fails completely, and the petitioner must have the decree which she seeks, and the costs of the suit.

Solicitors: *Gordon, Dadds & Co. ; James Ball & Son.*

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SOTHERDEN *v.* SOTHERDEN.

C. A.

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Jan. 17.

Husband and wife—Divorce—Wife's petition on ground of desertion by husband—Wife detained in mental asylum during part of statutory period of desertion—Whether such detention a bar to petition.

Where a wife has presented a petition for divorce under the Matrimonial Causes Act, 1937, s. 2 (b), on the ground that her husband has deserted her without cause for a period of three years immediately preceding the presentation of the petition, and has proved that the husband has intentionally absented himself from her for upwards of that period, the husband failing to appear in opposition to the petition, the Court ought not to refuse the relief asked for by the petitioner by reason merely of the fact that during a part of that period the petitioner has been an inmate of a mental hospital.

Pulford v. Pulford [1923] P. 18; and *Gatehouse v. Gatehouse* (1867) L. R. 1 P. & M. 331, applied.

APPEAL from an order of Bucknill J.

On May 24, 1915, Frederick John Sotherden (hereinafter called the "husband"), a builder's labourer, and his wife, Mrs. Lily Annie Sotherden (hereinafter called the "wife"), were married, and thereupon lived together at Southborough and other places in Kent, and at Northampton and Bexhill.

In August, 1931, the wife suffered from mental infirmity and was taken to Parkhurst Hospital.

Thereupon the husband and the three children of the marriage, each of whom was then under sixteen, went to reside with the husband's mother.

The husband went to see his wife at Parkhurst Hospital twice or perhaps three times.

In February, 1932, the wife was taken to the mental hospital at Maidstone and was continuously there until September 1, 1936, when she was able to leave.

On July 25, 1932, the husband left his mother's house and had not since been heard of, though inquiries were made for him.

On November 23, 1938, the wife, suing as a poor person, filed a petition in the High Court under the Matrimonial Causes Act, 1937, s. 2 (b), stating (inter alia) that her husband had deserted her without cause for three years and upwards immediately preceding the date of presentation of the petition,

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namely, from July, 1932, to the date of the petition, and since that time had not been heard of by her, and that therefore she prayed that her said marriage might be dissolved, and that she might have the custody of the children of the marriage. The petition was served upon the husband.

On October 9, 1939, the petition came before Bucknill J. Evidence of the above-mentioned facts was given by the wife and her mother-in-law, the former stating that she did not remember seeing her husband since December, 1932. The husband was not represented.

Bucknill J., in giving judgment, said that it seemed impossible to say that the husband had deserted his wife for three years preceding the presentation of the petition on November 23, 1938. The evidence was that she was taken to the mental hospital at Maidstone in February, 1932, and remained there until September, 1936. Thus, for nearly a year of the three years for which her husband was charged with having deserted her, she was in the mental hospital. The only evidence about the husband was that after his wife went to hospital their children went to his mother's house, that he also stayed there for a time, and that in July, 1932, he went away. It did not appear what his reason was for going away. It may have been because at that time he thought that his wife would never be cured, or because he was trying to find work, or because he did not like to be living with his parents. On these bare facts it could not be said that he deserted his wife while she was in the hospital. The petition should therefore be dismissed. His Lordship was sorry for the petitioner. If his judgment stood the only course for her to take would be to present another petition and to obtain leave to serve it by advertisement. She should do that at once, and then apply to the Court for a hearing at the earliest possible date.

The petitioner appealed. The appeal was heard on January 17, 1940.

S. J. Wilson Price for the wife, petitioner, appellant.
The learned judge was wrong in holding that the wife was

not entitled to a decree nisi for the dissolution of her marriage with her husband on the ground provided by the Matrimonial Causes Act, 1937, s. 2 (b), namely, that of his having deserted her without cause for a period of three years immediately preceding the presentation of the petition. Apart from the legal question whether there could be desertion by the husband of his wife while she was in the mental hospital, the facts here proved, namely, that on July 25, 1932, the husband went away, that since that date he has never communicated with his wife, children or parents, that in the meantime all their efforts to find him have been in vain, and that the petition was presented on November 23, 1938, together with the absence of evidence to show any good reason for his so absenting himself, constitute conclusive proof that the husband has deserted his wife without cause for the statutory period. It is submitted that the fact that during the first part of the statutory period the wife was an inmate of a mental hospital did not in law prevent the husband from being guilty of deserting her during that part of the period: see *Pulford v. Pulford*. (1)

[SLESSER L.J. referred to *Fitzgerald v. Fitzgerald*. (2)]

The wife does not now ask for custody of the children, but only for dissolution of her marriage.

SLESSER L.J. In my opinion this appeal should be allowed. [His Lordship stated the facts substantially as above set out, and continued:] There having been a period from 1932 to November 23, 1938, in which the wife had never seen the husband, or been offered any matrimonial home or maintenance, or any conjugal rights, she lodged a petition on the latter date asking for the dissolution of her marriage on the ground that she had been deserted for the statutory period of three years immediately preceding the date of presentation of the petition. The learned judge, as I read his judgment, has refused her petition solely upon the ground that, in so far as she was still in the mental hospital as late as September, 1936, she was unable to show that, at the date of the petition,

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(1) [1923] P. 18.

(2) (1869) L. R. 1 P. & M. 694.

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the desertion had been for three years. That can only be upon the basis that she was not deserted while she was in the mental hospital: because I think he has accepted the evidence, which was all one way, the case being undefended and undisputed, that in fact the husband had deserted her in every sense of the word ever since 1932. In my opinion, the learned judge was wrong in coming to the conclusion, there being clear evidence of intention to desert in 1932, that the fact that this lady was in the mental hospital during part of the three years' period prevents her from alleging that her husband deserted her for the statutory period.

I think that on this matter the judgment of Sir Henry Duke P., in *Pulford v. Pulford* (1), was correct. That was a case where the parties being married in 1883, in January, 1884, the wife was removed to a poor law asylum as a person of unsound mind. She was not finally discharged until 1902. The facts as stated in the report were as follows: "In 1922 "the wife took out a summons against her husband "for neglecting to provide her with reasonable maintenance, "and so causing her to live apart from him. This summons "was served on him in July, and finally dealt with on "August 3, when no order was made. On this occasion the "husband failed to recognise his wife, and the wife could not "swear that he was her husband until he had walked across "the Court, when she recognised his gait, as he was lame. "On August 17, 1922, on a fresh summons charging him with "desertion, but not giving any date for the commencement "of the desertion, the justices found him guilty of desertion "from August 3, the date of the former hearing. The husband "appealed." The matter, therefore, came before a Divisional Court; and Sir Henry Duke P. said (2): "The second objection "was of a more serious character. Counsel for the husband "cited *Fitzgerald v. Fitzgerald* (3), in which case there is a "statement by Lord Penzance so precise that it has been "relied upon as laying down a principle of law, in words which "the Court has merely to construe textually. That statement

(1) [1923] P. 18.

(2) Ibid. 20.

(3) L. R. 1 P. & M. 694.

"is this: 'Desertion means abandonment, and implies an
 " 'active withdrawal from a cohabitation that exists.' It is a
 "passage frequently relied on at the bar, as if it were a
 "text, governing all cases of alleged desertion that can arise,
 "which the Court is only entitled to construe and apply.
 "And in this case counsel for the husband asked: 'How can
 " 'it be said that a state of cohabitation existed in the face
 " 'of the termination by the action of the public authorities,
 " 'which action remained effective till 1902, and has never
 " 'been followed by the resumption of a matrimonial home?' "
 But the learned President went on to say that the matter must
 be construed broadly, and that Lord Penzance cannot be taken
 as giving an exhaustive definition of the circumstances in
 which desertion may be found. The President said (1):
 "It has been almost a commonplace in this Court to hold
 "that in order to ascertain whether there has been desertion,
 "you must look at the conduct of the parties." Then follow
 these important words: "There may be no matrimonial
 "home, and yet no forfeiture of the rights of the spouses.
 "Desertion is not the withdrawal from a place, but from a
 "state of things. The husband may live in a place, and make
 "it impossible for his wife to live there, though it is she and
 "not he that actually withdraws; and that state of things
 "may be desertion of the wife."

Applying that test, which seems to be a correct one, I think
 it would be right to say here that, on the undisputed evidence,
 the husband withdrew from the state of things in which the
 wife had a right to expect her conjugal rights, subject to the
 fact that for a time she was in this mental home, and that the
 withdrawal of the husband from the wife of her conjugal rights
 took place in 1932, when he deserted her. The mere fact that
 at a later period it was not possible to have a matrimonial
 home, or for conjugal rights to be accorded, does not seem
 to me to be a reason for saying that desertion which in fact
 began in 1932 was not effectively operative for three years
 before the time when this petition was brought. One can think
 of the class of case where, for the purposes of employment,

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C. A. a husband may be away altogether from his wife, and living
1940 in a different part of the world. I see no reason why, in such
SOTHERDEN circumstances, albeit he is parted from his wife, he should
v. not do such things in that other part of the world as would
SOTHERDEN. unequivocally amount to desertion of the wife. As Goddard L.J.
Slessor L.J. has said, the fact that this lady was in a hospital on account of
physical or mental infirmity can make no difference. In my
view the case of *Pulford v. Pulford* (1), of which I myself
approve, rightly considered, is authority for saying you must
look in an appropriate case at the actual facts of desertion,
without being excluded from coming to the conclusion that
there has been desertion merely because one of the parties is,
or both parties are, incompetent at the time to set up a
matrimonial home. Here there has been desertion; and I
think that this woman is entitled to succeed on this appeal.

In fairness to the learned judge, I think I ought perhaps
to add that I understand from counsel that the case of
Pulford v. Pulford (1) and the other authorities that have
been mentioned were not cited in the Court below.

MACKINNON L.J. I agree.

GODDARD L.J. I agree. The case seems to me to be one
of importance, especially having regard to the way in which
Bucknill J. looked at it. I need hardly say that I differ from
a learned judge for whose opinions I have the most unfeigned
respect only with great hesitation: but I am bound to say
that I think he has taken a wrong view here.

The facts show that, as far back as 1932, when the petitioner
had been for some little time in the asylum, the respondent
was living with his children at his mother's house. About
July 25, 1932, he went away and came back in the morning,
telling his mother that he had had a telephone call to see his
wife and had gone to see her. Then he went off, and from
that date they have never seen him: he simply disappeared.

The learned judge has said that, as the petitioner was in
the mental home in 1932, and down to within two years of

the presentation of the petition, so that for part of the three years which it is necessary to establish she was in a mental home, there cannot be desertion. He regarded the case as one in which the man had perhaps deserted his home and children, but had not deserted his wife. I respectfully differ. Clearly the intention of the man was, in July, 1932, to have no more to do with his wife, and to desert her—to go away. While she is in the hospital, be it a mental hospital or a hospital for physical diseases, he owed a duty to his wife. A man does not get rid of his obligations as a husband because his wife is in the hospital. If while she is in the hospital he disappears, and when she comes out of the hospital he still remains away and does not come back, I think the only reasonable inference to draw is that he intended to desert her at the time when he left her. Not only may the case of *Pulford v. Pulford* (1), which is very helpful on this occasion, be cited, but also the case of *Gatehouse v. Gatehouse* (2), which Sir Henry Duke P. referred to in giving his decision in *Pulford v. Pulford*. (1)

I will take this sort of case as an illustration of what I think would be clear desertion. A man who is living in England with his wife goes, with the consent of the wife, to Australia on a piece of business, which it is contemplated will last a year, so that he will not be returning to England for a year. But after he has been there we will say for three months, he writes to his wife and says: "I tell you I am never coming back to you. I intend to desert you, and to have no more to do with you from now." It seems to me then, if he comes back to England at the time he is expected, the end of the year, and does not resume cohabitation with his wife, it cannot be said that the desertion only started from the date when he came back. The desertion started from the date when he expressed his intention to renounce his obligations as husband to his wife. Intention is one of the most important matters to be taken into account when you are considering desertion. There are many cases in which there could be a withdrawing from cohabitation in the popular sense, where

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(1) [1923] P. 18.

(2) L. R. 1 P. & M. 331.

C. A. there would be no desertion, because there is no intention
1940 to desert. But where one finds, as I think can clearly be found
SOTHERDEN in this case, a plain intention to desert the wife in 1932, to
v. renounce his obligations as a husband, and to have no more to
SOTHERDEN. do with her, it seems to me that the only inference one can
Goddard L.J. draw here is, that from the July 25, 1932, the husband deserted
his wife.

For these reasons I agree that the petitioner is entitled to a decree.

SLESSER L.J. There will be a decree nisi for dissolution of the marriage with such costs as are attributable to a poor person's case.

Appeal allowed.

Solicitors for petitioner, appellant : *Montagu's and Cox & Cardale, for Snell & Co., Tunbridge Wells.*

J. R.

MACKENZIE v. MACKENZIE.

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Jan. 17.

Husband and wife—Divorce—Wife's petition on ground of desertion—Previous order of justices granting wife's application for maintenance but including by inadvertence a clause that she be no longer bound to cohabit with husband—Whether petition barred by clause in order—Amendment of order—Effect on period of desertion—Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), s. 2 (b).

A wife made an application to a court of summary jurisdiction for an order for maintenance against her husband. The court in making an order granting the application inadvertently omitted to strike out from the printed form adaptable to different orders the clause "That the complainant be no longer bound to "cohabit with her husband." More than three years after the making of that order the wife presented a petition in the High Court under the Matrimonial Causes Act, 1937, s. 2 (b), praying for a dissolution of her marriage on the ground that her husband had deserted her without cause for a period of three years immediately preceding the presentation of the petition:—

Held, by the Court of Appeal, that the non-cohabitation clause in the order of the court of summary jurisdiction was an integral part of that order, that its effect was to prevent a continuance of desertion after the date of that order, that as that order had been made more than three years before the presentation of the petition it was not competent for the wife to allege in the petition that she had been deserted by her husband for three years immediately preceding the date of the petition, and that the petition must therefore be dismissed.

Harriman v. Harriman [1909] P. 123 applied.

Cooper v. Cooper [1939] W. N. 402 considered and disapproved.

Quære, whether, if on an application duly made the court of summary jurisdiction should amend its order by striking out the non-cohabitation clause, the wife could then at once present her petition, or could not do so unless and until there had been desertion by the husband for a further period of three years from the date of amendment of the order.

APPEAL from an order of Croom-Johnson J. at Exeter Assizes.

On May 2, 1928, at Tavistock, Angus Mackenzie, hereinafter called the "husband" and Freda Evelyn Mackenzie, hereinafter called the "wife," were married. There was issue of the marriage one child, Alastair Ronald Mackenzie.

On October 30, 1933, in the petty sessional court at Paignton, in the county of Devon, the wife made a complaint stating that her husband had since October 1, 1933, at Paignton,

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been guilty of wilful neglect to provide reasonable maintenance for her and for her infant child, whom he was then legally liable to maintain, contrary to the Summary Jurisdiction (Married Women) Act, 1895 (15 & 16 Geo. 5, c. 49), s. 4; and she applied for the legal custody of the child while under the age of sixteen, and that her husband should pay to her such weekly sum as the court should consider reasonable; and a summons thereupon issued to the husband.

On January 12, 1934, the complaint was heard by the said court, nine justices being present. The wife gave evidence in support of the allegations in her complaint. The husband did not appear.

An order of that court, dated January 12, 1934, after reciting the complaint, the hearing thereof, and that the facts therein alleged had been duly proved, continued as follows:

"It is hereby ordered that:

"The complainant be no longer bound to cohabit with her husband, the defendant.

"The legal custody of the child of the marriage
"aged five years, while under the age of sixteen years, be
"committed to the complainant.

"The defendant shall pay to the complainant the sum
"of 1*l.* per week, from henceforth being 10*s.* for the wife and
"10*s.* for the child. . . ."

The order in that form was signed by a justice of the peace for the said county.

The order was made on a printed form, which contained clauses appropriate to various different orders, and at the end of which there was a direction to strike out such of the words as were not required.

The said court, or its clerk, by inadvertence, omitted to strike out from the form the clause "That the complainant "be no longer bound to cohabit with her husband," which was not appropriate to the order asked for by the applicant.

On April 17, 1934, that order was duly served upon the husband, who made no attempt to vary it.

On March 31, 1939, the wife presented a petition to the

Probate, Divorce and Admiralty Division (Divorce) of the High Court of Justice, under the Matrimonial Causes Act, 1937, s. 2 (b) (1), showing (inter alia) that her husband had deserted her for three years and upwards immediately preceding the presentation of the petition, and therefore praying that her said marriage might be dissolved, and that she might have the custody of the child.

On May 25, 1939, the petition was served on the respondent who raised no objection to it.

On November 3, 1939, the petition was heard, during the Devon Autumn Assizes, at Exeter, by Croom-Johnson J., who was of opinion that he could not treat as a mere nullity the clause in the order of the court of summary jurisdiction that the petitioner be no longer bound to cohabit with her husband, and that in view of that clause he was bound to hold that the desertion had ceased on the date of that order, namely, January 12, 1934, and his Lordship therefore made an order that the petition be dismissed.

The petitioner, who had obtained leave to appeal as a poor person, gave notice of appeal. The appeal was heard on January 17, 1940.

J. Scott Henderson for the wife, petitioner, appellant: The learned judge was wrong in dismissing the wife's petition.

The wife has in fact been deserted by her husband for three years and upwards immediately preceding the date of the petition. The clause in the order of the court of petty sessions purporting to direct that the wife should be no longer bound to cohabit with her husband ought not to prevent her from alleging desertion after the date of that order. In her application to that court the wife did not ask for a non-cohabitation order, and in the order of that court the non-cohabitation clause was included by inadvertence. That

(1) The Matrimonial Causes Act, 1937, provides: Sect. 2. "... "A petition for divorce may be presented to the High Court "... either by the husband or "the wife on the ground that the "respondent— (b) has "deserted the petitioner without "cause for a period of at least "three years immediately preced- "ing the presentation of the "petition;"

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C. A. order, so far as that clause of it is concerned, was made without
1940 jurisdiction and should be treated as a nullity. It is true
MACKENZIE that in the case of *Harriman v. Harriman* (1) it was held by
v. the Court of Appeal that a non-cohabitation clause in a
MACKENZIE. magistrate's order prevented a petitioner from alleging
desertion after the date of the order. But in the much later
case of *Cooper v. Cooper* (2) it was held by Merriman P.
that such a clause inserted by inadvertence in a magistrate's
order did not prevent a petitioner from asserting that she had
been deserted after the date of the order. It is submitted
that the later decision should be preferred to the former.

The respondent was not represented.

SLESSER L.J. We are very much obliged to Mr. Scott Henderson for the argument which he has addressed to us in this case on behalf of a petitioner appearing as a poor person : but we regret that we are unable to differ from the decision of Croom-Johnson J. dismissing this petition.

This was a petition by Freda Evelyn Mackenzie, who was married to Angus Mackenzie, the respondent, on May 2, 1928. The petition alleges that they lived and cohabited together at various places ; and then at 29, King Street, Tavistock. There is living issue of the said marriage one child, Alastair Donald Mackenzie, born on November 17, 1928. The petitioner alleges that the respondent has deserted her for three years and upwards immediately preceding the presentation of this petition.

On the matter coming before the learned judge, the case being undefended, there was put before him, among other matters, an order which had been made by the magistrates on January 12, 1934. By that order it is recited that the petitioner complained that her husband had, since October 1, 1933, at Paignton, been guilty of wilfully neglecting to provide reasonable maintenance for her and for the infant child whom he was legally bound to maintain. The magistrates by their order directed that the husband should pay his wife a certain sum by way of maintenance. But, unfortunately,

(1) [1909] P. 123.

(2) [1939] W. N. 402.

on the order being drawn up, the magistrate's clerk appears to have omitted to strike out from the usual printed form, the words which are appropriate in cases of cruelty, though they were not appropriate in this case, as appears, I think, clearly from the notes of the evidence on January 12, 1934. The clause "That the Complainant be no longer bound to cohabit with her husband the Defendant" thus became an integral part of the order. It appears that the order should have been simply: "Wife 10s., child 10s., and wife's custody of child," with no reference to the question of cohabitation, which of course did not arise on the wife's application, which was one exclusively for maintenance. That order, however, was duly served by a police constable on April 17, 1934, upon the defendant; and no attempt, or no successful attempt at any rate, has been made at any time since to vary it.

Therefore, the matter now stands thus. When the petitioner came before Croom-Johnson J. there was an order on the file of January 12, 1934, that she was no longer bound to cohabit with her husband, the defendant. On that the case of *Harriman v. Harriman* (1) is conclusive against her raising the matter which is necessary under the Act on which she relies to show that there has been desertion. The effect of this non-cohabitation clause in the magistrate's order is to prevent a continuance of desertion after the date of that order: and, therefore, it was not competent for her on her petition to allege that she had been deserted by her husband for three years: because after January 12, 1934, she could not allege that there was a continuance of desertion.

Mr. Scott Henderson agrees, as I understand him, that the case of *Harriman v. Harriman* (1), would have been fatal to his appeal but for the decision of the learned President of the Probate, Divorce and Admiralty Division in the case of *Cooper v. Cooper*. (2) The case is very summarily reported, but it appears that the wife had obtained from a court of summary jurisdiction an order for maintenance on the ground that her husband had deserted her, but by

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(1) [1909] P. 123.

(2) [1939] W. N. 402.

C. A. inadvertence, as here, the non-cohabitation clause was not struck out. In that case the clause was not in a form which made it very intelligible; because, according to the report, it stated "that the applicant be no longer bound to co-habit with her husband his wife." The learned President treated the case, as I read the judgment, upon the basis that it was to be read, that the petitioner was no longer bound to cohabit with her husband. In that sense *Cooper v. Cooper* (1), was a case precisely like the present case. There, as here, those words were not struck out. The learned President said: "that the petitioner's case was that the non-cohabitation clause was never intended to be in the order." So here. "The petitioner did not want protection, and was not asking for protection. From first to last, neither the husband nor the wife was treating the clause as effective in any way. Unfortunately, it was found to be in the order in its present form, that was to say, not to have been erased and, as counsel had pointed out, the clause did not make sense."

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Eliminating that question, whether the clause made sense, the President went on to say that he thought "that it would be pedantic to treat it as an effective non-cohabitation clause." I think that is on the basis that it might make sense. But whether that is so or not, I am of opinion that if the learned President treated it as being a non-cohabitation clause which did make sense, and was to be read as meaning that the petitioner be no longer bound to cohabit with her husband, I think he was wrong in the conclusion to which he came. I think his conclusion is inconsistent with the decision of this Court in the case of *Harriman v. Harriman* (2) to which I have just referred.

In the present case the order is an effective order; and we have to treat it as an order duly served on the husband which regulated the relations between the parties, and which has never since been varied. In these circumstances, it would be wrong to treat that order as a nullity, merely because it has not been treated by the parties as effective in any way.

(1) [1939] W. N. 402.

(2) [1909] P. 123.

As a matter of fact, we do not know in what way the husband may have regarded this order, which was duly served upon him. True it is that he has disobeyed that part of the order which deals with maintenance ; but whether he does or does not regard himself as still bound to cohabit with his wife we have no information. The result is that this order so existing at all material times, the petitioner cannot satisfy the requirements of the statute as to the period of desertion ; and this appeal must, therefore, be dismissed.

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MACKINNON L.J. I agree, also with regret. I observe that on January 12, 1934, there were no fewer than nine magistrates sitting at this petty sessional court at Paignton, assisted, no doubt, by a clerk. I do not know whether they have become aware of the fact that, owing to their stupid carelessness in putting this formal non-cohabitation clause into an order of the court for maintenance, they have occasioned the gravest injustice to this unfortunate petitioner. Unhappily, it is an injustice that we cannot remedy : and I, therefore, agree that this appeal must be dismissed.

GODDARD L.J. I agree. One difficulty I have with regard to the case of *Cooper v. Cooper* (1) is that there is nothing in the report to show on what the learned President was founding when he said : " From first to last neither the " husband nor the wife was treating the clause as effective in any " way." I think there must have been some evidence before him to that effect ; but there is nothing in the report to suggest what it was. Even if there had been such evidence, I do not know how, so long as the order stood, that non-cohabitation clause could be disregarded by the Court, in view of the decision in *Harriman v. Harriman*. (2) If husband and wife did agree in some way to treat the clause as ineffective, it was a very good reason for going back to the magistrate and asking him to correct the error. But so long as the order stood, it being one which the magistrate had power to make and did make, I do not see how the clause could be

(1) [1939] W. N. 402.

(2) [1909] P. 123.

C. A. disregarded by the Court, so long as it stood unamended. I do
 1940 not think the decision of the learned President in *Cooper v.*
 MACKENZIE *Cooper* (1), if correctly reported, can be upheld, and I agree
 v. that this appeal should be dismissed.
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Goddard L.J.

I should like to associate myself with every word that MacKinnon L.J. has just said about what happened at the court of summary jurisdiction. Of course, it may be—we do not know, but it is in the highest degree unlikely—that this woman, who probably was not even represented by a solicitor, asked the magistrates to put the non-cohabitation clause in the order. If she did, then, of course, she is the author of her own misfortune. But, even so, she ought to have been warned of the danger of it. I hope that in one way or another this case will be brought to the attention of the magistrates of the Paignton Division of the county of Devon, and more especially of their clerk; so that for the future they may not disregard the plain warning that was given by this Court, in the case of *Harriman v. Harriman* (2), that those words in this printed form ought to be struck out in cases where the only complaint is of failure to maintain.

MACKINNON L.J. I do not know whether it would be possible to adjourn the petition with a view to an application being made to the magistrates to vary their order by striking out the non-cohabitation clause.

J. Scott Henderson. There are two difficulties: We are unlikely to be able to serve the respondent with any summons to vary in the court of summary jurisdiction. Further, it would seem that if and when that was done, the three years' for desertion would have to start again from the date of the amended order.

GODDARD L.J. Are you quite sure about that? If you got the non-cohabitation clause struck out of the order on the ground that it ought never to have been there, might not the order as amended operate nunc pro tunc? The clause was included per incuriam.

(1) [1939] W. N. 402.

(2) [1909] P. 123.

SLESSER L.J. It is a very difficult question. Personally I would not be prepared without further consideration to express any opinion as to the effect of such an amendment of the order on the satisfaction of the statutory requirement of the period of desertion.

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Appeal dismissed.

Solicitors for the appellant : *Walter Crimp & Co., for Kitsons, Hutchings, Easterbrook & Co., Torquay.*

J. R.

C. A.

CAMPBELL v. CAMPBELL, LEWIS AND KEITH.

1939
Dec. 1.

Divorce—Practice—Husband charged with association with named women—No charge of adultery—Discovery—Correspondence and other documents relating to charge of association—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 198—R. S. C. Order XXXI., r. 19 A, sub-r. 3.

Sect. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides that "The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery" :—

Held, that where, in divorce proceedings, a wife charges her husband with association with named women, but does not charge him with adultery, and the husband has not sworn that the production of documents would tend to show that he had committed adultery, the section does not apply, and the husband may, on discovery, be ordered to produce correspondence and other documents relating to his association with the named women.

APPEAL from order of Henn Collins J.

A husband presented a petition for the dissolution of his marriage on the ground of the adultery of his wife, and he cited two co-respondents, and the wife, in her turn, presented a cross-petition. The wife in her answer to the husband's petition, while admitting acts of adultery with one of the co-respondents, alleged, among other things, that the petitioner by his conduct, conduced to such adultery, and in the particulars of the conduct conducing she made the following allegation : "The petitioner has consistently neglected the respondent and has been in the habit of associating with the following women in spite of the protest of the respondent." Then there were set out particulars of the women referred to. She did not charge the petitioner with adultery with any of these women. The common form of order for discovery was made against the petitioner for discovery of documents relating to the matters in question, save as to any issue of his adultery. When he made his affidavit he did not disclose any documents bearing on his association with any of the women mentioned

in his wife's answer. She, in her affidavit, disclosed a number of documents bearing upon that association which she had in her possession and, in view of the absence of any documents of that kind in her husband's affidavit of documents, she made an application under Order XXXI., r. 19A, sub-r. 3. On that summons the Registrar made an order in relation to three out of four classes of documents in respect of which the application was made. The first class related to correspondence between the petitioner and the women in question; the second class related to invoices, cheques, pass-book entries and so forth referring to purchases made by the husband by way of gifts to these women; and the third class related to particular correspondence with one of the women and other documents relating to payments in connection with that one. On an appeal, Henn Collins J. varied the Registrar's order by limiting the affidavit, which the petitioner was to make, to such of the documents specified as were disclosed in the wife's own affidavit. The wife appealed against that order.

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R. F. Levy K.C. and *Ifor Lloyd* for the appellant. The respondent relies on s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925, but here the appellant does not charge the respondent with adultery, and, therefore, that section does not apply. The words of Lindley L.J. in *Redfern v. Redfern* (1), "So, with regard to an affidavit of documents, "if there is reason to believe that a party has documents "relating to matters in question in the cause, other than his "or her adultery, it would be quite right to require an affidavit "as to such documents," are very apposite to this case. Here there is no allegation of adultery against the respondent or the women named, but the appellant alleges that his neglect of her and his association with the women named conduced to her adultery, and she is entitled to the discovery of any documents, relating to that association.

William Latey for the respondent. The question to be considered here arises out of a petition for divorce in which

C. A. adultery was charged, and under s. 198 no party in a suit
 1939 instituted in consequence of adultery shall be liable to be
 CAMPBELL asked any question tending to show that he or she has been
 v. guilty of adultery, unless he or she has given evidence in
 CAMPBELL, such proceedings, or be bound to answer any such question.
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This is a special rule of evidence applicable to proceedings instituted in consequence of adultery, which is analogous to the ancient rule of evidence in all other civil proceedings that a witness need not answer a question where his answer would have a tendency to expose him to any kind of criminal charge or to a penalty or a forfeiture or ecclesiastical censure. A witness cannot be asked such a question. The rule has always been rigidly applied in the Divorce Court.

The wife's answer does not actually allege adultery, but goes near to charging the petitioner with improper associations.

This is what is familiarly called a fishing inquiry. The respondent either has evidence of conduct conducing or not. The petitioner ought not to be compelled to supply her with evidence. The charge of conduct conducing cannot be severed from the charge of adultery. In *King v. King* (1) it was held that a party, in her personal answers to a libel, was not bound to answer on oath to articles which, though not on the face of them criminatory, might by possibility furnish a link in the evidence against herself.

The petitioner must prove his or her case ; the onus is not to be thrown on the opposite party. This principle was sustained by Bowen L.J. in *Redfern v. Redfern*. (2) Again, in *Cavendish v. Cavendish* (3) it was held that an order for discovery cannot be made in a divorce case when adultery is alleged.

SIR WILFRID GREENE M.R. This is a case where the husband is petitioning for the dissolution of his marriage on the ground of adultery by the wife, and the wife, in her turn, has presented a cross-petition. The wife in her answer to the husband's petition, while admitting acts of adultery with one of the co-respondents, alleged, among other things, that the petitioner,

(1) (1850) 2 Rob. Ecc. 153, 155, 157.

(3) [1926] P. 10.

(2) [1891] P. 139, 147.

by his conduct, conducted to such adultery, and in the particulars of the conduct conducing she made the following allegation: "The petitioner has consistently neglected the respondent and has been in the habit of associating with the following women in spite of the protest of the respondent." Then there are set out particulars of the women referred to. The common form of order for discovery was made against the petitioner for discovery of documents relating to the matters in question in this case save as to any issue of his adultery. When he came to make his affidavit he did not disclose any documents bearing on his association with any of the women mentioned in the wife's answer. She, in her affidavit, disclosed a number of documents bearing upon that association which she happened to have or to have had in her possession and, in view of the absence of any documents of that kind in the husband's affidavit of documents, she made an application under Order XXXI., r. 19A, sub-r. 3, which gives the Court power to order a party to state by affidavit whether any particular documents or classes of documents are or have been in the possession of that party. On that summons the Registrar made an order in relation to three out of four classes of documents in respect of which the application was made. The first class lettered (a) related to correspondence between the petitioner and the women in question; the second class (b) related to invoices, cheques, pass-book entries and so forth, referring to purchases made by the husband by way of gifts to these women; and the third class lettered (c) related to particular correspondence relating to one of them and other documents relating to payments in connection with that one. Those were the three matters in respect to which the Registrar ordered an affidavit to be made. On appeal to Henn Collins J., that learned judge varied the Registrar's order by limiting the affidavit, which the petitioner was to make, to such of the documents specified as were disclosed in the wife's own affidavit; in other words, she would get disclosure only in relation to documents which she already had or had had in her possession. The grounds on which the learned judge imported that limitation are not quite clear. It is suggested

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1939 no document could be relevant unless it had come to the
CAMPBELL knowledge of the person alleging such conduct, because if it
v. did not so come to her knowledge it could not have been
CAMPBELL, conducive. I cannot help thinking that the learned judge
LEWIS AND could not really have taken that view because it seems to
KEITH. me, as the allegation is not that the conduct conducive
Sir Wilfrid consisted in bringing certain letters to her notice, the mere
Greene M.R. fact that letters evidencing an association existed, whether or
not they were brought to her notice, would be relevant on the
fundamental issue which has in the first case to be established
—namely, the existence of the association. The effect of that
association in conducing to her conduct must of course depend
upon the extent to which, and the form in which, the existence
of that association came to her mind and influenced it. That
might have come by letter or it might have come by other
ways, but the existence of that association is a relevant matter
and I can see no ground for that reason for limiting the order
in the way in which the learned judge limited it.

The ground on which Mr. Latey, on behalf of the husband, argued that the order of the Registrar should not be restored was that the discovery of these documents would be contrary to the spirit, if not the language, of s. 198 of the Supreme Court of Judicature (Consolidation) Act of 1925, which provides that a witness shall not be liable to be asked, or be bound to answer, any question tending to show that he or she has been guilty of adultery (except in the circumstances stated) in proceedings instituted in consequence of the allegation of adultery. I need not read the section because it is a very familiar one. He says that although this particular issue is put up by way of defence and is not the issue of adultery which is raised in the cross-petition of the respondent, the wife, because the adultery alleged in that cross-petition was not adultery with any of the women named in her answer, the petitioner is not to be asked to disclose documents which tend to show that he has committed adultery and it is said that disclosure of these documents will tend to show that.

Now it is to be observed that the allegation is not an

allegation of adultery with any of these women but of association with them and I certainly cannot accept the view that association with other women, which does not amount to adulterous association, is irrelevant on the question of conduct conducing. That cannot be so. Accordingly the allegation is not, on the face of it, an allegation of adultery, nor is it necessary that it should be so. That being so I cannot myself see any ground whatever for saying that s. 198 has anything to do with the case. The matter has not even got to the point that the petitioner has sworn on oath that the discovery of these things would tend to show that he had been guilty of adultery. What the effect would have been if he had done so is neither here nor there and I say nothing about it, but unless and until such an affidavit was sworn it would be impossible for this Court to say that the production of these letters would tend to show that he is guilty of adultery.

A case was relied upon, namely, the case of *Cavendish v. Cavendish* (1), where the application was to discharge a subpoena duces tecum relating to documents in the possession of the respondent. The only issue in the case was adultery or no adultery and accordingly either those documents were irrelevant to the case altogether or they were relevant to the issue of adultery and on that basis the production of them would have been contrary to the section. In the present case the allegation not being an allegation of adultery with these women it is quite impossible for this Court to treat it as if it were.

There was one other point that Mr. Latey took. He suggested that the discovery was oppressive, at any rate with regard to paragraphs (b) and (c). In my opinion there is nothing in that, and in the result the appeal must be allowed and the order of the Registrar restored.

SCOTT L.J. I agree.

MACKINNON L.J. I agree.

Appeal allowed.

Solicitor for the appellant : *L. A. Hart.*

Solicitors for the respondents : *Kenneth Brown, Baker, Baker.*

(1) [1926] P. 10.

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Jan. 15, 16, 23. *Divorce—Evidence—Husband's petition on ground of adultery—Agreement for separation—Birth of child to wife—Husband's evidence as to non-access not admissible—Rule in Russell v. Russell applicable.*

The rule that evidence cannot be given by either spouse tending to bastardize or legitimize a child conceived and born during wedlock is absolute, and applies not only when the parties are living together, but also when they are separated either by a decree of a Court of competent jurisdiction or by their own volition. Where the only evidence of adultery in support of a husband's petition is the birth of a child to the wife, if the parties have been separated by the decree or order of a competent Court, the husband need prove no more than the date of the decree or order and the date of the birth of the child. If it must have been conceived after the date of the decree or order, there is a *presumptio juris* that it is a bastard. The wife may rebut this presumption, if she can, but she must do it by evidence other than her own. Where the only evidence is the birth of a child to the wife and the parties have voluntarily separated, whether by deed, writing under hand, oral agreement, or agreement implied from conduct, the husband cannot give evidence of non-access, but can prove that fact by any means open to him other than his own evidence. The presumption is that the child is legitimate. If the husband leads evidence to rebut that presumption, the wife can call, but cannot herself give, evidence in support of the child's legitimacy.

Mart v. Mart [1926] P. 24 and *Stafford v. Kidd* [1937] 1 K. B. 395 dissented from.

The principles laid down in *Inter the Parishes of St. George and St. Margaret, Westminster* (1706) 1 Salk. 123; *Morris v. Davies* (1837) 5 Cl. & F. 163; *The Aylesford Peerage Case* (1885) 11 App. Cas. 1; and *Russell v. Russell* [1924] A. C. 687, considered and applied.

In re Bromage [1935] 1 Ch. 605 approved.

Decision of Langton J. [1939] P. 377 reversed.

APPEAL from a decision of Langton J. upon a husband's petition for divorce. (1)

The marriage took place in April, 1926, at Stockport. In August, 1936, Mrs. Dorothy Margaret Ettenfield prayed for a decree for restitution of conjugal rights against her husband, Mr. William Eric Ettenfield, on the ground that he had withdrawn from cohabitation without just cause in

(1) [1939] P. 377.

August, 1935, and had refused to return to her. By his answer the husband pleaded just cause for leaving his wife, and said that there was a valid and subsisting agreement between them to live apart into which they entered in September, 1935. By her reply the wife traversed the husband's allegations.

By a cross petition filed in January, 1938, the husband sought the dissolution of his marriage on the ground of his wife's adultery. He relied on the birth of a child to the wife on May 26, 1937, and proof of non-access since before the separation in September, 1935. The wife by her answer denied the charge of adultery.

Langton J. held that the rule in *Russell v. Russell* (1), which debars a spouse from giving evidence which would tend to bastardize a child born during the marriage, did not apply where the spouses have separated under an agreement, even if it was not under seal. Such an agreement invaded the very special sanctity inherent in the conjugal relation, and did not differ in principle from a similar agreement embodied in a deed. Evidence by the husband of non-access was therefore admissible, and upon that evidence he granted the husband a decree nisi.

The wife appealed. The appeal was heard on January 15, 16, 1940.

John Latey and *J. L. Elson Rees* for the appellant. The decision of Langton J. was wrong. He considered he was bound by a decision of the Divisional Court in *Stafford v. Kidd* (2) in which that Court followed a decision of Bateson J. in *Mart v. Mart* (3) and held that the execution of a deed of separation, together with evidence that it was acted upon by the parties, was sufficient to rebut the legal presumption of access, and of the legitimacy of a child born during marriage in the case of a child conceived during a period when the spouses are living apart under the deed. Luxmoore J. in *In re Bromage* (4) held that the fact that the parties were

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(1) [1924] A. C. 687.

(3) [1926] P. 24.

(2) [1937] 1 K. B. 395.

(4) [1935] Ch. 605.

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at the material dates living separate and apart under a separation deed did not render the presumption inapplicable. Langton J. held that if evidence of non-access was admissible in cases where the parties were living apart under a deed of separation it was also admissible where the parties agreed to live apart by an agreement which was not under seal. Since the earliest days there has been a presumption of legitimacy in the case of a child born of a married woman except where there has been a judicial decree of separation. There is also a rule of evidence that evidence of non-access is not admissible to bastardize the child of a married woman except where the parties are living apart under a judicial decree of separation. In *Goodright v. Moss* (1) Lord Mansfield said in the course of the argument: "The law of England is "clear, that the declarations of a father or mother, cannot "be admitted to bastardize the issue born after marriage." And later in his judgment he said: "As to the time of the "birth, the father and mother are the most proper witnesses to "prove it. But it is a rule, founded on decency, morality, "and policy, that they shall not be permitted to say after "marriage, that they have had no connection, and therefore "that the offspring is spurious; more especially the mother, "who is the offending party." It was held by Lord Ellenborough C.J. in *Rex v. Inhabitants of Kea* (2) that a woman cannot give evidence of the non-access of her husband to bastardize her issue, though he be dead at the time of her examination as a witness. He said that the principle of public policy precluded her from being a witness to the non-access of her husband. It was also held in *Rex v. Inhabitants of Sourton* (3) that neither husband nor wife can be a witness for the purpose of proving non-access during marriage. It was held in *Russell v. Russell* (4) that the rule of law that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardize a child born in wedlock applies to proceedings instituted in

(1) (1777) 2 Cowp. 591, 592, 594.

(2) (1809) 11 East. 132, 133.

(3) (1836) 5 Ad. & E. 180.

(4) [1924] A. C. 687.

consequence of adultery. Lord Birkenhead said (1) that "the rule as laid down is not limited to any special class of case. It is absolutely general in the comprehensiveness of its expression. It has no geographical qualification." The non-admissibility of such evidence was put by Lord Dunedin upon public policy. Lord Finlay said (2): "There is a strong presumption that the child of a married woman was begotten by her husband. This, however, is not a presumption *juris et de jure*; it may be rebutted by evidence. The fact that the wife had immoral relations with other men is not of itself sufficient to displace the presumption of legitimacy; non-access by the husband at the time when the child must have been begotten must (unless there be incapacity) further be proved. Proof of non-access cannot be given for this purpose either by the husband or by the wife; neither of them can be asked any question tending to prove such non-access; it must be established entirely by the evidence of other witnesses." It was held by the House of Lords in *Morris v. Davies* (3) that the presumption of law in favour of the legitimacy of a child begotten and born of the wife during separation from her husband may be rebutted by evidence of the conduct of the parties. It was also held in the *Aylesford Peerage* case (4) that where the legitimacy of a child born in wedlock was in issue previous statements by the mother that the child was a bastard were admissible as evidence of her conduct, although she could not be allowed to make such statements in the witness box.

[GODDARD L.J. referred to *Warren v. Warren* (5) where Swift J. held that evidence of confession of adultery by a wife who had left her husband and had registered a child without naming a father was admissible as evidence in a suit for divorce.]

There was sufficient evidence in *Mart v. Mart* (6) aliunde of the evidence of the husband of non-access. The ground of that decision is that the presumption of legitimacy was

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(1) [1924] A. C. 687, 698.

(2) *Ibid.* 705.

(3) [1837] 5 Cl. & F. 163.

(4) [1885] 11 App. Cas. 1.

(5) [1925] P. 107.

(6) [1926] P. 24.

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rebutted by a deed of separation in the same way as it would be rebutted by a decree of judicial separation. It was held in *Andrews v. Andrews and Chalmers* (1) that the old rule of the Ecclesiastical Courts, which assumed that husband and wife have no access during the existence of a divorce a mensa et thoro, applies to the case of a magistrates' separation order under the Summary Jurisdiction (Married Women) Act, 1895, which contains the usual clause that the wife shall not be bound to cohabit with her husband. If therefore a child is born which must have been conceived during the existence of such an order, the rule laid down in *Russell v. Russell* (2) does not apply, and the husband may obtain a divorce without other evidence than the wife's admission.

[SLESSER L.J. Where there is a separation otherwise than by a decree of judicial separation there is no presumption that a child is illegitimate.]

In *In re Bromage* (3) Luxmoore J. held that he was bound by the decisions of the House of Lords in *Morris v. Davies* (4) and the *Aylesford Peerage* case (5) and therefore could not follow the decision in *Mart v. Mart*. (6) The same distinction was drawn in *Inter the Parishes of St. George and St. Margaret, Westminster* (7) as is now contended for in the present case, namely, that a voluntary agreement for separation has a different effect from a decree for judicial separation or a magistrates' order. The Court there said: "When a woman is separated "from her husband by such a divorce [a mensa et thoro], "the children she has during the separation are bastards; "for we will intend a due obedience to the sentence, unless "the contrary be shewed; but if baron and feme without "sentence part and live separate, the children shall be taken "to be legitimate, and so deemed till the contrary be proved: "for access shall be intended." It would be against public policy and morality if the rule did not apply in a case of an agreement for voluntary separation. The mere fact of a

(1) [1924] P. 255.

(2) [1924] A. C. 687.

(3) [1935] Ch. 605.

(4) 5 Cl. & F. 163.

(5) 11 App. Cas. 1.

(6) [1926] P. 24.

(7) (1706) 1 Salk. 123.

consensus of the parties to live separate does not make the evidence of non-access any more admissible.

[SLESSER L.J. referred to *Rimmer v. Rimmer*. (1)]

A decree for judicial separation was in 1857 substituted for a divorce a mensa et thoro. In both those cases there is no presumption of legitimacy where the conception takes place after the decree has been made. The rule as to the non-admissibility of evidence by the husband or wife of non-access and the presumption as to legitimacy of children born in wedlock are interdependent. In *Hetherington v. Hetherington* (2) Sir J. Hannen P., dealing with an order of magistrates for separation, said: "There is no doubt that from the time such an order is made—which is equivalent to a judicial separation and the ancient divorce a mensa et thoro—the parties are authorized to live apart, and from that moment all the presumption which exists in the case of married persons as to access and the legitimacy of children is reversed." An agreement for separation is abrogated by evidence of intercourse coupled with an intention of the parties to live together: *Rowell v. Rowell*. (3)

Goodbody for the respondent. The decision of Langton J. in this case was correct because there should be no distinction between a judicial separation and a voluntary agreement for separation with regard to the admissibility of evidence of non-access. The case of *Inter the Parishes of St. George and St. Margaret, Westminster* (4) has always been considered to be good law. It was there held that if husband and wife "without sentence part and live separate, the children shall be taken to be legitimate, and so deemed till the contrary be proved; for access shall be intended; but if a special verdict find the man had no access, it is a bastard." It is there clearly implied that evidence of non-access is admissible. The *Aylesford Peerage* case (5) is the strongest case against this contention.

[SLESSER L.J. That case has been accepted as being good law in *Russell v. Russell*. (6)]

(1) (1930) 46 Times L. R. 624n.

(2) (1887) 12 P. D. 112, 114.

(3) [1900] 1 Q. B. 9.

(4) 1 Salk. 123.

(5) 11 App. Cas. 1.

(6) [1924] A. C. 687.

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C. A. Bateson J. considered the *Aylesford Peerage* case (1) in
 1940 *Mart v. Mart*. (2) He explained the difficulty by saying
 ETTENFIELD that evidence of the wife's conduct might be received as part
 v. of the *res gestæ*, but not as direct evidence of the fact. It
 ETTENFIELD. was decided in *Russell v. Russell* (3) that so long as the husband
 and wife are living together they may not give evidence which
 will bastardize a child born during wedlock. The contention
 that is now put forward on behalf of the respondent is not
 confined to an agreement to separate which is reduced into
 writing, but applies also to an oral agreement. It is admitted
 that an exception does exist to the rule in *Russell v. Russell* (3),
 namely, where parties are separated by a sentence of the
 Court. There is no difference in this respect between a decree
 for judicial separation and an agreement for voluntary
 separation. An agreement for voluntary separation puts an
 end to the marital relationship.

[SLESSER L.J. What is the difference in this respect
 between an agreement for voluntary separation and an
 agreement by conduct.]

[GODDARD L.J. referred to *Reg. v. Murrey*. (4) It seems
 to have been assumed that Sir J. Hannen P. in *Hetherington v.*
Hetherington (5), decided what in fact he did not decide. It
 was thought that the early cases dealt with the competency of
 witnesses, whereas in fact they did not deal with that point.]

[SLESSER L.J. Lord Birkenhead in *Russell v. Russell* (6)
 does not suggest that there is any exception to the rule which
 he said is absolutely general.]

There is no distinction for this purpose between a decree
 of judicial separation and an agreement for voluntary
 separation, whether oral, written or by deed. In such cases a
 spouse is entitled to give evidence of non-access. The
 decisions in *Mart v. Mart* (2) and *Stafford v. Kidd* (7) were
 correct and should be upheld.

John Latey replied.

Cur. adv. vult.

- (1) 11 App. Cas. 1.
- (2) [1926] P. 24.
- (3) [1924] A. C. 687.
- (4) (1704) 1 Salk. 122.

- (5) 12 P. D. 112.
- (6) [1924] A. C. 687, 698.
- (7) [1937] 1 K. B. 395.

1940. Jan. 23. The judgment of the Court (SLESSER, MACKINNON and GODDARD L.J.J.) was read by Goddard L.J.

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GODDARD L.J. In 1924 the House of Lords decided, in *Russell v. Russell* (1), that the rule long established in legitimacy cases that neither spouse could be allowed to give evidence as to the paternity of a child born during wedlock applied also in divorce proceedings. This decision had a profound and far-reaching effect on the conduct of divorce cases. Those who remember the great number of undefended petitions which followed the end of the last war, will recall how common it was for a petitioning husband, who in so many cases had been a serving soldier, after proving his marriage, to be asked no more than: "When did you last have intercourse with your wife?" When he had given the date, proof was given that the wife had given birth to a child the conception of which must have taken place at a date later than that given by the husband, and a decree followed. After the *Russell* case (1), this simple proof could no longer be accepted; and it is perhaps not surprising that the ingenuity of practitioners endeavoured to find distinctions, or ways by which the rigour of this rule could be mitigated. The case of *Warren v. Warren* (2) is an early example; but we need say nothing about that case, because it does not come here into question; nor do we desire to throw any doubt on that decision. In 1926 came the case of *Mart v. Mart* (3), before Bateson J. Founding his judgment upon the case of *Hetherington v. Hetherington* (4), he decided that where parties are living apart under a deed of separation, the presumption of access is rebutted; as it is where the parties are separated by a decree of the Court, and he therefore held that the evidence of the spouses as to access or non-access, which was excluded by the *Russell* case (1), could in these circumstances be received. This decision has been uniformly followed in the Divorce Division; it has been approved by the King's Bench Division in *Stafford v. Kidd* (5), and the only challenge

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(1) [1924] A. C. 687.

(2) [1925] P. 107.

(3) [1926] P. 24.

(4) 12 P. D. 112.

(5) [1937] 1 K. B. 395.

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to its correctness till the present case is to be found in *In re Bromage* (1), where Luxmoore J. declined to follow it, considering that it was in conflict with two decisions of the House of Lords. It is to be observed that neither Bateson J., nor the Divisional Court appear to have had their attention called to the case of *Inter the Parishes of St. George and St. Margaret, Westminster* (2), which formed the foundation of Lord Hannen's judgment in *Hetherington v. Hetherington*. (3) We have now to determine whether *Mart v. Mart* (4) was rightly decided.

In the present case all that need be said as to facts is that Langton J. has found that the husband left his wife about August 6, 1935. There was no deed or written agreement, but the parties in the following month orally agreed to live apart, the husband making a weekly payment to his wife; and both parties have observed and acted upon this agreement ever since. Whilst so living apart, the wife gave birth to a child on May 26, 1937. Having found that there was this agreement the judge was of opinion, and so far we agree with him, that for the purpose of considering whether or not the husband could give evidence of non-access there was no difference between a separation by deed or by any other form of agreement. Accordingly, holding that he was bound by the decision of the Divisional Court in *Stafford v. Kidd* (5), he admitted the evidence of both the husband and wife on the question of access; and, preferring that of the former, granted him a decree. Except for the husband's evidence that he had never had intercourse with his wife since the separation, there was no evidence whatever against her.

Now the rule as laid down by the House of Lords in *Russell's* case (6), is in the widest possible terms. It applies to all cases of whatever nature, where the paternity of a child is in question. As the Earl of Birkenhead put it (7), it "is not limited to any special class of case. It is absolutely general in the comprehensiveness of its expression. It has no

(1) [1935] Ch. 605.

(2) 1 Salk. 123.

(3) 12 P. D. 112.

(4) [1926] P. 24.

(5) [1937] 1 K. B. 395.

(6) [1924] A. C. 687.

(7) *Ibid.* 698.

"geographical qualification." Accordingly, if the husband goes to the other side of the world, on a business visit extending over a period of a year or more, and say twelve months after his departure his wife gives birth to a child, nevertheless he cannot give evidence of non-access. If the birth is the only evidence of adultery, his absence must be proved by other evidence. It would indeed be a strange result if merely because the parties agreed to a separation, intending it to be permanent, but continued to live, as in this case, a few minutes' walk from each other, they were able to give evidence, the one denying and the other asserting access, merely because of this agreement to separate. But it is said that there has always been an exception to the rule, which is that, where the parties are separated by the sentence of the Court, their evidence on this matter is admissible; and, admitting that exception, it is contended that there can be no sound reason for treating a separation by consent in any way differently from a separation by the Court. If it were true that there was this exception, the corollary might well follow; and this is what is at the root of Bateson J.'s judgment in *Mart v. Mart*. (1) But apart from the fact that the House of Lords said in *Russell v. Russell* (2) that the rule is absolutely general in its comprehensiveness, thereby admitting of no exception, when the cases are examined which are supposed to support the view of an exception, it will be found that they are not authority for any such proposition. Sir James Hannen P. founded his judgment in *Hetherington v. Hetherington* (3) on the case already mentioned of the *Parishes of St. George and St. Margaret, Westminster*. (4) This case was decided about the year 1707, when Lord Holt presided in the King's Bench. So it had been law for some seventy years before Lord Mansfield decided *Goodright v. Moss* (5), so often referred to with approval in *Russell's* case. (2) The decision was that where spouses were separated by sentence of divorce a mensa et thoro children born to a woman during the separation

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(1) [1926] P. 24.

(2) [1924] A. C. 687.

(3) 12 P. D. 112.

(4) 1 Salk. 123.

(5) 2 Cowp. 591.

C. A. are presumed to be bastards ; but that if the parties separate
 1940 without a sentence, that is voluntarily, the presumption is
 ETTENFIELD that the children are legitimate until the contrary is proved.
 v. There is not a word in this case to suggest that the spouses
 ETTENFIELD. were competent witnesses to prove or disprove legitimacy.
 It deals solely with the "presumptio juris" that arises
 firstly in the case of parties separated by the Court, and
 secondly where the separation is voluntary. It does show
 that, contrary to what we think must have been the opinion
 of Bateson J., there is a difference for this purpose between a
 decree and a deed of separation ; but it has nothing to do
 with the competency of the spouses to give evidence.

Reference may also be made to *Reg. v. Murrey*. (1) There
 it was said that "if the husband was out of the four seas
 "during all the time of the wife's going with child, the child
 "is a bastard ; but if he were here at all within the time,
 "it is legitimate, and no bastard," clearing showing that this
 is what the law presumes ; but, again, no authority for saying
 that the spouses can testify on the subject. In a note to this
 case it is said, and repeated in the House of Lords in *Morris v.*
Davies (2), that "the doctrine concerning the four seas is now
 "exploded," and this might be somewhat misleading. It is
 more accurate, we think, to say that what is exploded is the
 idea that if the husband were ever within the four seas the
 child could not be found to be a bastard. This appears most
 clearly in the speech of Lord Eldon in the *Banbury Peerage*
 case (3) in 1810 ; and it is of interest to note that Lord Eldon
 referred to the same decision of Hale C.J., as did Lord Holt
 in the case of the *Westminster Parishes* (4), though under the
 name of *Haspall v. Collins* and not *Dickens v. Collins*, no
 report of this case can be found ; and it is due to the researches
 of Mr. Riches, the Librarian of the Bar Library, that we have
 been able to find the reference to it in Lord Eldon's speech.
 Evidence to establish the bastardy can be called, as was done
 in *Morris v. Davies* (2) ; but this does not mean that it can
 be that of either spouse. The view that these cases deal

(1) 1 Salk. 122.

(2) 5 Cl. & F. 163.

(3) (1811) 1 S. & St. 153.

(4) 1 Salk. 123.

with presumptions and presumptions only is supported by Lord Finlay's observations in the *Russell* case (1), on *Hetherington v. Hetherington* (2), where he also points out that the latter case affords no support for the admission of this evidence. Sir James Hannen was only repeating what had been said by Lord Holt as to the presumption which arises where there had been a sentence of the Court, and which does not otherwise obtain. To the same effect is *Rex v. Inhabitants of Sourton* (3) in 1836. There it was sought to prove that a female pauper was illegitimate; and the mother's husband was called to prove that five years before the birth he had left his wife and ever since had lived 100 miles away with another woman, his wife's sister, by whom he had a family. The chances, therefore, that he could have been the father of the pauper were non-existent; but, nevertheless, the Court held not only that he could not give evidence as to non-access, but, also, that he could not even be examined as to any collateral fact, for example, that he had been living 100 miles away with a paramour, as tending to prove non-access. Then there comes the *Aylesford Peerage* case. (4) That case was before the Committee of Privileges; but as the various dicta of the Members of the Committee were approved in *Russell v. Russell* (5), they are now to be regarded as authoritative in this Court. In that case the Dowager Lady Aylesford, as guardian of her infant son, claimed that he was the son of her late husband, the seventh Earl, and entitled to succeed to the dignity. Lord and Lady Aylesford had separated in 1876, a deed of separation was executed in 1877, and a child was born in 1881. All their Lordships were of opinion that neither Lady Aylesford nor, had he been living, Lord Aylesford, could have been called to prove who was the real father of the child. That case appears to us to be conclusive of the matter, and we find some difficulty in understanding what view Bateson J. took of it. He said, quite correctly, that the Committee decided that evidence

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(1) [1924] A. C. 687, 717.

(2) 12 P. D. 112.

(3) 5 Ad. & E. 180.

(4) 11 App. Cas. 1.

(5) [1924] A. C. 687.

C. A. of the conduct of the spouses was admissible as part of the *res gestæ*, but not as direct evidence of the fact. But he does

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not deal anywhere with the emphatic expressions in the speeches, more especially in that of Lord Bramwell (1), that the spouses could not testify although they were separated. It remains to deal with *Stafford v. Kidd* (2), and it is important to understand exactly what questions the Court there had to decide. It was a case stated by magistrates arising out of a bastardy summons. The complainant was a married woman, and was separated from her husband, but not under an order of any Court. Unless, therefore, she could prove non-access by her husband, it was argued, and the justices agreed, that she must fail. Some independent evidence was given of non-access, but this did not satisfy the justices. They accordingly held that evidence of non-access was a condition precedent to the appellant's proceeding with the case; and this was agreed on all hands to be right. They also held that a deed of separation had not the same effect as a decree of judicial separation, or a separation order, in rebutting the presumption of access and legitimacy. For the reasons we have already given, we think that on this point also the justices were right. The justices then went on to hold that as there was no judicial separation, the appellant was bound by the rule in *Russell's* case (3), and could not herself give evidence bastardizing the child. In our opinion they were right in holding that she could not give evidence; but were wrong in thinking that the disability arose from the fact that she was not separated from her husband by an order of Court. The disability arose from the rule of law which applies whether she be separated by an order of Court or not. The Divisional Court, following *Mart v. Mart* (4), held that a separation deed had the same effect as a judicial separation; and it is perhaps unfortunate that the case of the *Westminster Parishes* (5) was not brought to their attention, as had it been they might well have come to a different conclusion. But

(1) 11 App. Cas. 11.

(2) [1937] 1 K. B. 395.

(3) [1924] A. C. 687.

(4) [1926] P. 24.

(5) 1 Salk. 123.

they also held, as the Lord Chief Justice put it, that the appellant was released from the fetters of *Russell's* case (1); and in this view we respectfully differ, for reasons already given. We, however, do not understand why it is said that the *Aylesford Peerage* case (2) added anything new to *Morris v. Davies* (3), which was one of the cases relied on by Luxmoore J. in *In re Bromage*. (4) We have not thought it necessary to deal in detail with *Morris v. Davies* (3), because the point we have here to decide only arose there by inference. The question was as to the legitimacy of the plaintiff; and the House of Lords held that what was called in the case circumstantial evidence was admissible on the subject, notwithstanding that the mother's husband was always in the kingdom. The husband and wife were separated; and what is to be observed is that no one suggested that either was a competent witness. In the *Aylesford Peerage* case (2), as already pointed out, there was the direct opinion of all the learned Lords that the spouses could not give evidence in spite of their being separated. Then again, both in the *Aylesford Peerage* case (2) and in the *Russell* case (1), the House held that the Matrimonial Causes Act, 1857, which had been in force for many years before the former came before the House, had made no difference to the law. Nor do we understand the exact implication of the passage which says that *Morris v. Davies* (3), belongs to a period when divorce alone could get rid of the presumption of legitimacy, and when proceedings for judicial separation were unknown. It is perfectly true to say that in those days divorce alone could rebut the presumption; but divorce then was only a mensa et thoro, and that was the equivalent of the decree of judicial separation: if authority be needed for this, it is to be found in Sir James Hannen's judgment in *Hetherington v. Hetherington*. (5) The question, of course, could not arise where there had been a divorce a vinculo matrimonii, or what we should nowadays call a decree of nullity. We are, therefore, unable to agree

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(1) [1924] A. C. 687.

(2) 11 App. Cas. 1.

(3) 5 Cl. & F. 163.

(4) [1935] Ch. 605.

(5) 12 P. D. 112, 114.

C. A. with either *Mart v. Mart* (1) or *Stafford v. Kidd* (2), and
1940 think that Luxmoore J.'s criticism of the former case is sound.

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The result of our examination of the authorities may be summarized as follows: (1.) The rule that evidence cannot be given by either spouse tending to bastardize or legitimize a child conceived and born during wedlock is absolute, and applies not only when the parties are living together, but when they are separated either by a decree of a Court of competent jurisdiction or by their own volition. (2.) Where the only evidence of adultery in support of a husband's petition is the birth of a child to the wife, if the parties have been separated by the decree or order of a competent Court, the husband need prove no more than the date of the decree or order, and the date of birth of the child. If it must have been conceived after the date of the decree or order there is a presumption juris that it is a bastard. The wife may rebut this presumption if she can, but she must do it by evidence other than her own. (3.) Where the only evidence is as mentioned in the last paragraph and the parties have voluntarily separated, whether by deed, writing under hand, oral agreement, or agreement implied from conduct, the husband cannot give evidence of non-access; but can prove that fact by any means open to him other than his own evidence. The presumption is that the child is legitimate. If the husband leads evidence to rebut that presumption the wife can call, but cannot herself give, evidence in support of the child's legitimacy.

We are well aware that in deciding against the reception, in cases of divorce, of the class of evidence which has been accepted since *Mart's* case (1), further, in some cases insuperable, difficulties may be put in the way of petitioners; but rules of law, especially those which admit of no exception, sometimes have that result. It is not always easy to explain the reason for rules which have long formed part of our law. When, for instance, Lord Kenyon laid down dogmatically in *Merryweather v. Nixan* (3), that there could be no contribution between joint tortfeasors, he was stating a rule

(1) [1926] P. 24.

(3) (1799) 8 T. R. 186.

(2) [1937] 1 K. B. 395.

for which, as the report of the Law Revision Committee recommending its abrogation showed, no one knew either the origin or the reason; and its justice was certainly not conspicuous. The reason given by Lord Holt for a different presumption prevailing, according to whether the parties are judicially or non-judicially separated, may not to some minds appear satisfactory; but there is the rule. If the evidence given in this case were rightly received, it is obvious that a serious inroad has been made on a rule which the highest Court in the kingdom has declared to be without exception. If the rule works hardship, it is for the Legislature and not for the Courts to mitigate its effect.

The appeal will be allowed, the decree nisi rescinded, and the petition dismissed.

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Appeal allowed.

Leave to appeal to House of Lords.

Solicitors for appellant: *Boxall & Boxall, for Woosnam & Co., Blackpool.*

Solicitors for respondent: *Gregory, Rowcliffe & Co., for J. Ogden Hardicker, Hanson & Co., Manchester.*

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Feb. 21, 22,
23, 26;

Mar. 8.

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Shipping—Marine insurance—Damage to yacht—Sitting in uneven berth—Perils ejusdem generis with perils of the sea — Institute Yacht Clauses—Negligence of “master.”

The plaintiff claimed for a particular average loss under a policy of marine insurance. The policy insured the plaintiff's yacht against perils of the sea and all other perils ejusdem generis, and was subject to the Institute Yacht Clauses, clause 5 of which provided that the insurance also covered damage to hull caused by “negligence of master. . . .”

The plaintiff arranged to have the yacht moved from Southwick to Shoreham for docking. She left for Shoreham in charge of one O.C., the manager of the Sussex Yacht Works, and by him was so negligently berthed in their dock that she received damage by sitting on a block of wood and afterwards on some baulks of timber, and also from the uneven nature of the bottom of the dock.

The defendant, one of the subscribers to the policy, contended that, as the yacht was deliberately placed where she received the damage, there was nothing fortuitous in the accident; it was bound to happen, and was not a peril ejusdem generis with a peril of the sea; and, further, that in berthing the yacht O.C. was not her master but an independent contractor:—

Held, (i.) that, although it was intended that the yacht should be docked, it was not intended that she should be so negligently docked as to be allowed to sit on a dangerous bottom, and that the intervention of those responsible for the docking provided the fortuitous circumstances which entitled the plaintiff to recover under the terms of the policy for a loss due to a peril ejusdem generis with a peril of the sea, namely, stranding.

(ii.) That O.C. was the “master,” and prima facie responsible for the docking, and that the plaintiff was also covered under clause 5 of the Institute Yacht Clauses, whether or not the damage was due to a marine peril.

ACTION on a policy of marine insurance (transferred by consent from the King's Bench Division (Commercial List)).

The plaintiff, Guy Baxendale, claimed under a policy of marine insurance the proportion of the subscription of the defendant, Charles William Fane, to the policy.

The policy, which was on the plaintiff's yacht *Lapwing*, insured against the ordinary marine perils, and was subject to the Institute Yacht Clauses, which, by clause 5, provided: “This insurance also specially to cover . . . loss of or

"damage to hull or machinery directly caused by
 "negligence of master, mariners, engineers, or pilots."

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The plaintiff alleged that whilst so insured the yacht suffered a particular average loss by perils insured against, namely, by perils of the sea or perils of a like nature, viz. : "all other
 "perils, losses and misfortunes, ..." or, alternatively, by the negligence of the master or mariners.

The defendant denied that the *Lapwing* suffered the damage in the manner alleged, and, alternatively, contended that if she did so the damage was not occasioned by any peril insured against under the policy.

The facts are sufficiently summarized in the headnote and are fully set out in the judgment.

Gordon Willmer K.C. and *R. E. Gething* (for *W. L. McNair* on war service) for the plaintiff.

The plaintiff is covered both under the general words of this policy and under clause 5 of the Institute Clauses. "All other
 "perils" admittedly include only perils similar in kind to the perils specifically mentioned in the policy (see r. 12 of the Rules for Construction of Policy), but the damage in this case was occasioned by a peril ejusdem generis with a peril of the sea, namely, stranding; the *Lapwing* "stranded" first on a waterlogged block of wood and afterwards on baulks of timber in a convex shaped dock bottom: see *Cullen v. Butler* (1), *Phillips v. Barber* (2) and *Davidson v. Burnand*. (3)

Further, this damage was caused by the negligence of O'Connor, the manager of the Sussex Yacht Works; and O'Connor, within the meaning of s. 742 of the Merchant Shipping Act, 1894, and other statutes was "master," the "person in charge" of the *Lapwing* while she was being docked: the plaintiff would have been liable if the yacht had done damage to third parties, as for example, by collision, while in O'Connor's charge: *The Ripon City*. (4) Qua the plaintiff the accident was fortuitous. The mere fact that O'Connor placed the yacht where he did does not make the

(1) (1816) 5 M. & S. 461.

(3) (1868) L. R. 4 C. P. 117, 120.

(2) (1821) 5 B. & Ald. 161.

(4) [1897] P. 226.

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accident less fortuitous; many deliberate acts are covered by the policy, e.g., stranding on a sand bank due to deliberately steering in a certain direction. It is not intended that the vessel will damage herself by running ashore, or, in this case, by taking the ground in the dock: see *The Xantho* (1), *P. Samuel & Co., Ltd. v. Dumas* (2) and Arnould's *Marine Insurance*, 12th ed., ss. 816, 817.

Kenneth Carpmael K.C., Cyril Miller and Stephen Murray for the defendant. The policy only covers the assured against events that may happen, not against events that must happen. If placed on a convex berth or resting on a baulk of timber (as to which there is no reliable evidence) which only supported the yacht for a portion of her length, she was bound to suffer damage; there was nothing fortuitous in the accident, she was deliberately in the position. This was not a loss from a peril of the sea or from a peril ejusdem generis with a peril of the sea: see *Magnus v. Buttemer* (3), and the observations of Lord Mersey in *E. D. Sassoon & Co. v. Western Assurance Co.* (4) "There must be some casualty, something which could not be "foreseen," per Lord Herschell in *The Xantho* (5); in all the cases cited on behalf of the plaintiff there was some fortuitous circumstance. There was no stranding for which the plaintiff can recover: *Wells v. Hopwood* (6), *Kingsford v. Marshall*. (7)

As regards the Institute Yacht Clauses, whether there was negligence in docking or not, O'Connor was acting as the manager of the Sussex Yacht Works and not in any way as the master of the *Lapwing*; he was an entirely independent contractor: *Donovan v. Laing, Wharton and Down Construction Syndicate, Ltd.* (8) and *Reedie v. L. & N. W. Railway Co.* (9) The word "master" in clause 5 must be construed strictly. *The Ripon City* (10) is not an authority for the plaintiff's proposition; it is not denied that qua damage to third parties while

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| (1) (1887) 12 App. Cas. 503. | (6) (1832) 3 B. & Ad. 20, 34. |
| (2) [1923] 1 K. B. 592; [1924] | (7) (1832) 8 Bing. 458. |
| A. C. 431. | (8) [1893] 1 Q. B. 629. |
| (3) (1852) 11 C. B. 876. | (9) (1849) 4 Ex. 244, 257. |
| (4) [1912] A. C. 561, 564. | (10) [1897] P. 226. |
| (5) 12 App. Cas. 503, 509. | |

on the way to Shoreham the plaintiff would have been liable, but that is because a maritime lien would have attached to the *Lapwing*, whether or not O'Connor was the plaintiff's servant. In *Stott (Baltic) Steamers, Ltd. v. Marten* (1), where the Institute Time Clauses were very similar to the yacht clauses in the present case, it was held that the "Inchmaree" clause did not expand the description of risks concerned in the policy, it did not enlarge the genus; and it is submitted that even if (contrary to the defendant's contention) O'Connor was the master when the vessel was first docked and was negligent, he was not the master at the subsequent docking, and in any event the plaintiff cannot recover unless the resulting loss was due to a peril ejusdem generis with a peril of the sea: i.e., clause 5 merely means that the assured can recover in respect of damage to hull, etc., caused by a peril ejusdem generis with a peril of the sea, even when occasioned by negligence; otherwise the plaintiff could recover if, for example, O'Connor had negligently loaded the yacht on a trolley ashore.

[Reference was also made to *Grant, Smith & Co. and McDonnell, Ltd. v. Seattle Construction and Dry Dock Co.* (2), *River Weir Commissioners v. Adamson* (3) and *Trinder, Anderson & Co. v. Thames and Mersey Marine Insurance Co.* (4)]

Willmer K.C. in reply. The proximate cause of this damage, whether done because the yacht sat on a waterlogged block, or on the baulks of timber, was the negligent way in which she was docked. The defendant's argument that, because the act of docking was deliberate, the damage was not fortuitous, is too wide. This was a damage by stranding: see *Fletcher v. Inglis* (5), and the observation of Bayley J. in *Bishop v. Pentland*. (6) If the plaintiff intentionally produces a state of affairs which must result in damage possibly he cannot recover; but if, whether intentionally or accidentally, he produces a state of affairs which may or may not produce damage, the plaintiff can recover on the policy, even if, as events turn out afterwards, the damage was inevitable. All the cases

(1) [1916] 1 A. C. 304.

(2) [1920] A. C. 162.

(3) (1877) 2 App. Cas. 743.

(4) [1898] 2 Q. B. 114.

(5) (1819) 2 B. & Ald. 315.

(6) (1827) 7 B. & C. 219.

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cited on this point can be reconciled on those two propositions.

O'Connor was clearly the master of the *Lapwing*, and he cannot divest himself of his special knowledge as to the state of the berth acquired as manager of the Sussex Yacht Works. If the defendant's contention that it is only a peril ejusdem generis with a peril of the sea that is covered if the master is negligent, there would be no need to have clause 5 at all.

Cur. adv. vult.

1940. Mar. 8. HODSON J. read the following judgment : The plaintiff is the owner of the yacht *Lapwing*, and claims for a particular average loss under a time policy of marine insurance dated May 31, 1937, the period covered by the policy being from May 25, 1937, to May 24, 1938.

The plaintiff was insurer under the policy against perils of the sea and all other perils ejusdem generis, and the policy was subject to the Institute Yacht Clauses which provide (inter alia) as follows :—

“ Clause 5. This insurance also specially to cover (subject “ to the free of average warranties, or any special conditions “ of the policy) loss of or damage to hull or machinery directly “ caused by the following : Explosions, bursting of boilers, “ breakage of shafts or any latent defect in the machinery or “ hull. Negligence of master, mariners, engineers or pilots. “ provided such loss or damage has not resulted “ from want of due diligence by the owner of the vessel or any “ of them or by the managers.”

The defendant contends that the damage (if any) suffered by the *Lapwing* was not covered by the policy.

The facts are as follows :—

The *Lapwing* is a wooden vessel, seventy-seven feet long, built in 1897 by a well-known firm of yacht builders. She was purchased by the plaintiff in 1937 for 2300*l.* He made improvements, bringing the cost up to about 3000*l.*, and she was insured for this figure. In spite of her age she was, although not completely watertight, a seaworthy vessel.

In May, 1937, the plaintiff arranged to have her moved

from Southwick, where she had been laid up, to Shoreham, in order that she might be put in an open-ended tidal dock and have her bottom cleaned and painted by the Sussex Yacht Works, Ltd. On May 12 she left Southwick for Shoreham with a man named O'Connor, the manager of the Sussex Yacht Works in charge, and a Mr. Campbell Muir, the engineer employed by the owner, in charge of the engines. She was unable to get into the dock on the 12th as another small yacht had not floated off. She was berthed against a free wharf during the night.

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On the 13th she was moved into the dock with O'Connor still in charge and thereafter the casualty occurred from which the plaintiff's claim arises.

Originally the plaintiff's claim was that she was so negligently berthed that as the tide fell she sat on a block of waterlogged timber under her keel, about twenty-three feet abaft the stem, with her stern overhanging the sill of the dock, and that she fell over on her starboard side and her keel and false keel were set up and crushed, her planking was started, and she was generally seriously strained.

By an amendment at the hearing, as a further and alternative claim, it was pleaded that on May 18, having been taken out of the dock and cross baulks of timber having been laid across the bottom of the dock, she was again so negligently berthed by those in charge of her that as the tide fell she came to rest in such a position that the damage was increased.

There is no doubt that the vessel did suffer a severe hogging strain, including serious damage to her keel, in consequence of one or other of these dockings.

On the 14th or 15th the owner noticed that the vessel had listed to starboard, but nothing seriously amiss was found until May 16, when the engineer noticed that the vessel was leaking seriously.

She had previously leaked only to the extent of about six gallons a day, which required about twenty strokes of the pump to clear her. On this occasion it took two men about six hours to clear her. He next discovered a rope floating in the water on the starboard side before the foremast which

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was made fast to something he could not see. This rope was subsequently found to have been attached by the works foreman to a waterlogged block of timber about ten inches square and three feet long. The block was eventually hauled out by the night watchman and placed on the dockside.

On the same day the engineer found that the lid of the coal bin would not come up and was prevented from so doing by the stanchions which run from deck to keel in way of the foremast. In this area he found that the deck had been forced up and the galley and saloon floors were set up. He saw one and heard another glass portlight crack. On the same day the engineer communicated with the owner.

On the 18th, having been taken out of the dock, the vessel was floated in again so that she came to rest on seven cross baulks of timber, and in this position she was first surveyed. It then appeared that she was seriously strained. On June 13 she was moved and properly slipped; she was subsequently surveyed on several occasions and the damage was investigated.

In particular her keel and false keel were found to be set up and crushed in two places, namely, twenty-two feet abaft the stem and thirty-one feet four inches forward of the stern post. The damage to the forward part of the keel was very nearly in the way of the damage which had previously been discovered by the engineer.

It is quite true that no one saw the block under the keel although, if she had been resting on it at low water, when the dock was dry, one would have expected the block to have been seen in this position if it were there.

However, between the 13th and 16th the vessel must have lifted and fallen on the tide several times, not necessarily in quite the same place.

It was said by the defendant that the damage, if any, caused forward in the position where the block is supposed to have been can be otherwise explained and that the plaintiff has not proved that damage was caused by the keel resting on the block. He relied on the shape of the bottom of the dock. This consisted of forty feet of concrete forward, not flat but slightly convex, so curved that the maximum convexity,

allowing for the fact that the ship was not hard up against the fore-end of the dock, would be almost immediately in way of the damaged stanchion. Aft of the forty feet there were twelve feet of broken concrete, and aft again shingle and mud.

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The shape of the dock bottom might thus account for the damage, apart from the forward damage to the false keel. As to this, it was contended that there was in that area no fresh damage to the keel and no damage to the false keel. If there was any trifling damage to the false keel it was said to be consistent with an indentation made, perhaps, by a stone, and of no significance. If the indentation is significant it was claimed that it may well have been made by the vessel resting on one of the seven baulks on which she was resting subsequently when she was surveyed.

I have formed the conclusion from the evidence given as to the damage in this area, including the damage to the keel and the damage to the false keel conforming thereto, that the block of wood was the cause of the original damage.

It is clear that whether the vessel was lying partially supported by the block, or on the dock bottom, instead of being properly supported by blocks over her whole length, she was placed in a dangerous and improper position, and the straining which she suffered was the natural consequence of this docking. The same applies to the position which the vessel subsequently occupied on the seven cross baulks, the first five of which were on the forty feet of undamaged concrete. Both her stem and stern were overhanging to a considerable extent entirely unsupported and the supported portion of the keel would naturally take the convex shape of the dock. It was estimated by one of the surveyors that the keel had dropped thirty-six inches from the horizontal. Any damage which she had previously suffered would be likely to become more serious so long as she lay in this position. No one could say precisely what proportion of the serious damage which was established over the whole ship was due to the first docking, especially as she was not surveyed until after the second docking.

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I have come to the conclusion on the evidence that the plaintiff has established that the bulk of the damage was due to the first docking, although it may well have been and probably was accentuated by the second docking.

The defendant contended that, although there might be something to be said for the waterlogged block as constituting the cause of a casualty ejusdem generis with a peril of the sea, the plaintiff has not established that the block was ever under the keel at any time, and that the damage can perfectly well be explained by the shape and condition of the dock and the improper docking of the vessel therein on the two occasions. His contention in law is that neither the dock bottom nor the seven baulks can be a peril of the sea or within the general clause of the policy.

Lord Herschell dealt with this subject in his speech in *The Xantho* (1), where he says: "I think it clear that the 'term 'perils of the sea' does not cover every accident or 'casualty which may happen to the subject-matter of the 'insurance on the sea. It must be a peril 'of' the sea. 'Again, it is well settled that it is not every loss or damage 'of which the sea is the immediate cause that is covered 'by these words. They do not protect, for example, against 'that natural and inevitable action of the winds and waves, 'which results in what may be described as wear and tear. 'There must be some casualty, something which could not 'be foreseen as one of the necessary incidents of the adventure. 'The purpose of the policy is to secure an indemnity against 'events which may happen, not against events which must 'happen. It was contended that those losses only were 'losses by perils of the sea, which were occasioned by extra-'ordinary violence of the winds or waves. I think this is too 'narrow a construction of the words, and it is certainly not 'supported by the authorities, or by common understanding. 'It is beyond question, that if a vessel strikes upon a sunken 'rock in fair weather and sinks, this is a loss by perils of the 'sea. And a loss by foundering, owing to a vessel coming 'into collision with another vessel, even when the collision

"results from the negligence of that other vessel, falls within
"the same category."

Since she was deliberately placed on the dock bottom and on the seven baulks, it was said that you have something which must happen as opposed to something which may happen ; and reliance was placed in particular on the decision in *Magnus v. Buttemer*. (1) In that case damage resulting from a ship taking the ground on the falling of the tide in a tidal harbour in a spot where she was properly placed for unloading was held not to be a stranding within the ordinary terms of a policy of insurance. As Maule J. said : "here, "nothing has happened which the assured could have wished "or anticipated to happen otherwise than it did happen. "They intended the ship to take the ground as she did. "There was no accident."

It was contended that this case cannot be distinguished from *Magnus v. Buttemer* (1), since it was the design that she should take the ground as the tide fell. I do not think the mere presence or absence of deliberation or design is the true test in ascertaining whether there has been a casualty covered by the ordinary terms of a marine policy. If that were so, the test could not properly be applied in many cases, which are clearly covered by the policy. In a normal case of collision, although the collision be not brought about deliberately, yet the acts leading up to the collision may often be deliberately performed. It is true that it was intended that the vessel should be docked, but not that she should be so negligently docked as to be allowed to sit on a dangerous bottom, and I think that the intervention of the negligence of those responsible for the docking provides the fortuitous circumstances which entitles the plaintiff to recover under the terms of the policy. In *Magnus v. Buttemer* (1) there was nothing beyond what may be called ordinary wear and tear. In this case there was an accident.

In *Bishop v. Pentland* (2), a vessel was moored alongside a quay in a tidal harbour. It became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the

(1) 11 C. B. 876, 882.

(2) 7 B. & C. 219.

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shore, to prevent her falling over upon the tide leaving her. The rope with which she was fastened not being of sufficient strength, broke when the tide left the vessel, and she fell over upon her side and was thereby stove in and injured. Bayley J. said (1): "I think, that so long as the vessel was "on the ground, and lashed to the posts on shore, she was "not stranded; but when she fell over on her side, and lay "on the ground in that position, she was stranded. The "falling over, then, was not in the ordinary course of the "voyage, but in consequence of an unforeseen accident, out "of the ordinary course of the voyage, viz., the breaking of "the rope." In that case it appeared that the vessel falling over and taking the ground was probably due to the negligence of the crew in not providing a rope of sufficient strength.

I have come to the conclusion that whether the damage was caused by the vessel sitting on the block, or on the uneven bottom of the dock, or on the seven baulks of timber, or by a combination of these things, in each case the plaintiff has established a loss due to a peril ejusdem generis with a peril of the sea, namely, stranding.

The plaintiff also relies on clause 5 of the Institute Yacht Clauses, and says that the damage was directly caused by the negligence of the master. It was said by the defendant that O'Connor was not the master, but the manager of the yacht works. It was argued that, although he may, perhaps, be treated as the master for some purposes; for example, he might have subjected the ship to a maritime lien in the event of collision occurring between Southwick and Shoreham, yet he was not the master within the meaning of the clause when he was docking the vessel. "Master" has been defined in many statutes. In the Merchant Shipping Act, 1894 (s. 742), "Master" includes every person (except a pilot) having command or charge of any ship.

I have no doubt that O'Connor was the master of the vessel at the time of the first docking. He was still in charge of her. The fact that he was at the same time manager of the yacht works, and was the servant of the yacht works not of the

plaintiff, seems to me to make no difference. Indeed, his dual position enables his negligence to be more clearly established, because he was in a position to know what was the nature of the bottom of the dock in which he was placing the vessel.

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If, however, part of the damage is to be attributed to the second docking, the situation is not quite clear. There was put in evidence by the plaintiff a statement sent to him by the defendant's solicitors, which purports to show that a Mr. Page became the master of the vessel on May 16, i.e., before the second and after the first docking. It is not clear whether he had in fact taken charge of the vessel at the time of the second docking; and it was argued on behalf of the defendant that it would be unjust to find negligence against him, especially as he has not been called to give his account of the event. The allegation of negligence against the master was made in the pleadings, and I find that the plaintiff has established that the ship was negligently docked on both occasions. It was not incumbent on him to call the masters or either of them to establish this negligence. The master being in charge of the ship is *prima facie* responsible for the docking of the ship in a proper manner.

I have therefore come to the conclusion that the plaintiff is covered under clause 5 of the Institute Yacht Clauses in respect of loss of or damage to hull caused by negligence of the master, whether or not the damage was due to a marine peril.

His Lordship then dealt with the question of quantum, and gave judgment for the plaintiff for two seventy-sevenths of 1575*l.* with interest at 4 per cent. from May 10, 1938.

Solicitors for the plaintiff: *Keene, Marsland & Co.*

Solicitors for the defendant: *Ince & Co.*

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A wife obtained a decree absolute of divorce on November 21, 1932. An order by consent was made on December 29, 1932, directing the husband to pay to the wife during their joint lives and until further order maintenance of 5*l.* a week, "without prejudice to any further order." In 1933 payments fell into arrear, and the wife took out a judgment summons for 90*l.* The parties then agreed that the husband should pay the wife a lump sum of 1250*l.* in full discharge of all claims by her to maintenance. On October 9, 1933, an order was made embodying the agreement. The order also discharged the order of December 29, 1932, and dismissed the maintenance petition and the judgment summons. On January 31, 1940, the wife took out a summons calling on the husband to show cause why she should not have liberty to apply for maintenance in accordance with the provisions contained in the order of October 9, 1933:—

Held, reversing Bucknill J., that the application was not "on" a decree for divorce within the meaning of s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, and that the Court had no jurisdiction to grant it.

The orders of December 29, 1932, and October 9, 1933, criticized.

APPEAL from Bucknill J.

On May 12, 1932, a wife obtained a decree nisi for dissolution of her marriage. That decree was made absolute on November 21. On December 8 she presented a petition for maintenance. Upon that petition a consent order was made on December 9 directing the husband to pay to the wife "during their joint lives, and until further order, maintenance "at the rate of 5*l.* a week, free of income tax, without prejudice "to any future order."

In the summer of 1933, the husband's payments fell into

arrear, and a judgment summons was taken out by the wife for 90*l.* arrears. Before that summons was heard, negotiations between the parties took place, as a result of which the wife agreed to take a lump sum of 1250*l.* in satisfaction of all past and future claims for maintenance. A further summons was then taken out by the wife on October 5, 1933, upon which Bateson J. on October 9, made the following order: "Upon hearing counsel for both parties and by consent I do order that the respondent do pay to the petitioner the sum of 1250*l.* in satisfaction of all sums now or at any time hereafter payable to the petitioner in respect of maintenance, that the existing consent order for maintenance be dismissed, that the petition be dismissed, that the pending judgment summons against the respondent for arrears of maintenance be dismissed This matter not to be re-opened without leave of the Court." Subsequently the financial position of the husband improved, and on January 31, 1940, the wife took out a summons calling upon the husband to show cause why she should not have liberty to apply for maintenance in accordance with the provision contained in the order, dated October 9, 1933. On February 19, 1940, that summons came before Bucknill J., who made an order that "the petitioner be at liberty to file forthwith a notice of application for an order for maintenance."

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The husband appealed. The appeal was heard on March 19, 1940.

Sir William Jowitt K.C., H. W. Barnard K.C., and P. R. Hollins (for *S. E. Karminski* on war service) for the appellant. The order of October 9, 1933, dismissed the order for maintenance and it no longer exists. The present application by the wife is, therefore, asking for an entirely new order, and it is not made "on" a decree for divorce within the meaning of s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925. The word "on" in the section must mean within a reasonable time. The Court, therefore, has no jurisdiction now to make such an order. It is true that under the amending section, s. 14 of the Administration of Justice (Miscellaneous

C. A. Provisions) Act, 1938, the Court may have regard to all the
 1940 circumstances of the case, but there are no special circumstances
 MILLS in this case. Where the parties have agreed that the husband
 v. shall pay the wife a lump sum in full satisfaction of any claim
 MILLS. for maintenance, the Court can make an order embodying the
 agreement : *Jenkins v. Jenkins* (1) and *Olding v. Olding*. (2)

[Sir Wilfrid Greene M.R. That case means that the Court cannot order a husband to pay a lump sum under s. 190, sub-s. 1.]

That is so. The questions of such an application being out of time and the Court exercising its discretion are dealt with in *Robertson v. Robertson*. (3)

[Sir Wilfrid Greene M.R. Would not the wife be able to get an order for maintenance under s. 190, sub-s. 2 ?]

The word "on" is still a difficulty. In *Robertson v. Robertson* (3) Jessel M.R. says (4) : "Whatever meaning may 'be given to the word 'on' in the Act of Parliament, it is very 'difficult to extend it to above a year.'" That was followed in *Scott v. Scott*. (5) The words "liberty to apply" in an order for maintenance do not help a wife : *Stephen v. Stephen* (6). The order of October 9, 1933, being based upon an agreement, cannot now be altered : *Lambert v. Lambert*. (7)

This matter cannot be re-opened seven years after the decree absolute with or without the leave of the Court.

They also referred to *Shearn v. Shearn* (8) and *Maidlow v. Maidlow*. (9)

Melford Stevenson for the respondent. The order of December 29, 1932, contained a power to vary it. That was quite independent of the petition for maintenance. And some effect must be given to the words "this matter not to be "re-opened without leave of the Court." They must mean that the matter could be re-opened with the leave of the Court. Sect. 190 does not affect this case. The Courts always have jurisdiction to grant a wife maintenance : see Lord Atkin in *Hyman v. Hyman*. (10) The payment of the lump sum by the

(1) (1930) 46 Times L.R. 309.

(2) (1930) 46 Times L. R. 539.

(3) (1883) 8 P. D. 94.

(4) Ibid. 96.

(5) [1921] P. 107.

(6) [1931] P. 197.

(7) [1936] 3 All E. R. 20.

(8) [1931] P. 1.

(9) [1914] P. 245.

(10) [1929] A. C. 601, 628.

husband has nothing to do with the jurisdiction of the Court. The order of October 9, 1933, did not discharge, but merely suspended, the order for the payment of 5*l.* a week to the wife. The Court has always had power to have regard to the circumstances of the case when the wife's application for maintenance is out of time : *Legge v. Legge*. (1)

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SIR WILFRID GREENE M.R. This appeal raises a question of importance, but one which to my mind is not really open to doubt.

The facts of the case are shortly these. On May 12, 1932, the wife obtained a decree nisi for dissolution of her marriage. That decree was made absolute on November 21, 1932. On December 6, 1932, the wife presented a petition for maintenance. Upon that petition an order was made on December 29, 1932, which was a consent order directing the husband to pay to the wife "during their joint lives and until further order maintenance at the rate of 5*l.* a week free of tax." The order went on to add the words "without prejudice to any future order," an addition the necessity for which I am quite unable to appreciate. The insertion of unnecessary words like these in an order is liable to cause doubt and confusion ; and it is a practice which had better be avoided in future.

In the summer of 1933, the husband's payments fell into arrear ; and a judgment summons was taken out for 90*l.* arrears. Before that summons was heard, negotiations took place, with the assistance of the solicitors for the parties, as a result of which the wife agreed to accept a lump sum of 1250*l.* in satisfaction of all past and future claims for maintenance. That bargain having been come to, a summons was taken out by the wife on October 5, 1933, asking that cause be shown why an order should not be made in the form of the order which was eventually made, subject to one qualification which has given rise to the present controversy. I need not read the summons. The order made upon it by Bateson J. was in these terms : "Upon hearing counsel for both parties and by consent I do order that the respondent do pay to the petitioner

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"the sum of 1250*l.* in satisfaction of all sums now or at any time hereafter payable to the petitioner in respect of maintenance, that the existing consent order for maintenance be discharged, that the maintenance petition be dismissed, that the pending judgment summons against the respondent for arrears of maintenance be dismissed, and that the respondent do pay the petitioner's costs of this application and of the said judgment summons as taxed or agreed." Down to that point, the order embodied the arrangement made between the parties. But then the following words were added : "This matter not to be re-opened without leave of the Court." The actual order being a consent order, I think that this part of it must be taken to be inserted in the order by the consent of the parties. It is upon the precise meaning and effect of that sentence that the present dispute really turns.

Subsequently to the making of that order, it is said (and I think not disputed) that the husband's financial position improved. There is no necessity to go into the reasons for that ; but that was the ground upon which the wife based the application, which is now before us on the husband's appeal.

On January 31 of this year the wife took out a summons calling upon the husband to show cause why the wife should not have liberty to apply for maintenance in accordance with the provision contained in the order dated October 9, 1933. That summons came before Bucknill J., who on February 19, 1940, made an order that "the petitioner be at liberty to file forthwith a notice of application for an order for maintenance" ; and he gave leave to appeal.

That appeal is accordingly now before us : and it is said that in the circumstances the learned judge had no jurisdiction to make that order. It is not suggested that, if he had jurisdiction, we should be justified in interfering with what, upon that footing, would have been an exercise of discretion. The only matter we have to deal with is the single matter of the jurisdiction of the Court.

The first point to bear in mind is the language of the relevant statutes which confer jurisdiction upon the Divorce Court in

respect of maintenance. Those provisions are to be found in s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 14 of the Administration of Justice (Miscellaneous Provisions) Act, 1938.

Under s. 190 of the Act of 1925, for the present purpose there are two forms of order which the Court is empowered to make. One is an order securing to the wife a gross or annual sum of money. That is under sub-s. 1 of s. 190. The other is an order under sub-s. 2 for the payment "during the joint "lives of the husband and wife " of monthly or weekly sums. An order under that sub-section may be made either in addition to or instead of an order under sub-s. 1.

Under the Act of 1925, there was power in the Court in case of an increase of the means of the husband, to vary any order made under sub-s. 2 of s. 190 for the payment of a periodical sum. That particular proviso has now gone, by reason of s. 14 of the amending Act of 1938, under which an order made under sub-s. 2 of s. 190 of the Act of 1925 can be discharged or varied or suspended. The power of the Court with regard to those matters is now wider than it was before : but that circumstance does not affect what we are now called upon to consider.

At the outset one matter must be remembered with regard to the jurisdiction of the Court under the provisions of s. 190, to which I have referred. That jurisdiction can only be exercised on any decree for divorce or nullity of marriage. Accordingly, if an application is made by a wife of which it can fairly be said that an order made upon it would not be made "on " such a decree, the Court has no power to accede to the application. The precise time limit within which the application may be made cannot be laid down ; it would be unfortunate to attempt to lay it down and I certainly would not propose to do so. But that a time limit must exist and one which, within certain limits, may be varied, has been decided in the case of *Scott v. Scott*. (1) That is a decision of this Court establishing the proposition that the words "on a decree " indicate that the time for the application must be a reasonable

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one in relation to the date of the decree. If the present application had been a new application made in the year 1940 in reference to a decree of divorce which was made absolute in November, 1932, it could not, in my opinion, be suggested for one moment that the Court would have had jurisdiction to deal with the application. An order made on an application launched so many years afterwards would not have been an order made on a decree for divorce. The present application can only succeed if it can be treated as in some way referable to the previous proceedings.

Bearing that in mind, it is necessary now to look at the order of October 9, 1933, in order to see on its true construction what it means. Apart from the contested words at the end, it seems to me that the construction of this order is clear beyond any possibility of doubt. The order directs the payment of a lump sum "in satisfaction of all sums now or at any time hereafter payable to the petitioner in respect of maintenance." It discharges the existing consent order for maintenance, under which the 5*l.* a week was paid, which was dated December 29, 1932. It also dismissed the maintenance petition. Taking that language at its face value (and it is perfectly clear language) the result down to that point is that the existing order for maintenance has gone, and that the petition upon which it was made, and upon which any future application for its variation would have hung, has also gone. The order on the face of it also purports to direct payment of a lump sum. That payment is something which the Court had not jurisdiction in itself to order, because the jurisdiction of the Court, so far as relevant, is confined to securing, under sub-s. 1 of s. 190 a gross or annual sum, or under sub-s. 2 ordering the payment of a periodical sum to the wife.

It is settled that the Court has not power to order payment to the wife out and out of a lump sum. But it has also been held that the Court has jurisdiction by consent to make an order of that character. The order, therefore, on the face of it, is an order by consent directing the husband to do something which the Court, apart from consent, could never order him to do; and by consent it is discharging the original

order, and dismissing the petition upon which it was made.

I should have thought that the true construction of an order in those terms could not be subject to controversy. But the main argument put forward on behalf of the wife is to this effect. It is said that when the order is read as a whole, including the words "this matter not to be re-opened without "leave of the Court," its true meaning is not that the order of December, 1932, was discharged, but that its operation was merely suspended, with the consequence that the wife at any future time could call upon the Court to exercise jurisdiction (which on that hypothesis the Court would have retained) of varying the order for payment of a periodical sum, if circumstances justified such variation.

That argument is one which I find myself quite unable to accept. It seems to me that such a construction, if any respect is to be paid to language, is treating this order as doing the exact opposite to what it purports to do, namely, keeping alive and in force an order which in terms it has discharged. Whatever these words may mean, or may purport to mean, they cannot, in my opinion, be read as in any way qualifying the order in so far as it discharges the original order of maintenance.

If that construction be right, there is really nothing left in the argument. But it was tentatively suggested, though not pressed, by Mr. Stevenson, that if this order upon its true construction discharges the original maintenance order, and thereby deprives the Court of the statutory power of varying that order, which, apart from discharge, would have remained in its hands, it must be regarded as something which the Court had no jurisdiction to do.

It was suggested (and reference was made in support of the suggestion to some observations of Lord Atkin in *Hyman v. Hyman* (1)) that the law does not allow the wife by any bargain to deprive the Court of the power to vary an order for maintenance, once it has been made. In other words, such an order, which is inherently variable, once made, must remain alive for all time, and no consent by the parties can ever put

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an end to it ; and that any order of the Court purporting to put an end to it would be ultra vires. To my mind that proposition is a startling one. I can see no reason, in the language of the statute, or in the policy of the law, why parties in such circumstances, where an order for maintenance of this nature has been obtained, should not be able by agreement to put an end to it, and to substitute some other provision which they may agree upon. The suggestion that once an order for maintenance is made it is indestructible, seems to me to be based upon an extravagant construction of the Act of Parliament and an extravagant view of public policy. It is an argument which I cannot accept but, as I think I have said, Mr. Melford Stevenson really did not press it. He was, moreover, in the further difficulty, which I need not discuss, that this order, in so far as it exercises, or purports to exercise, a jurisdiction which the Court conceives itself to have, is one which, on ordinary principles, would be binding upon the parties, not merely according to its terms, but as impliedly containing a decision by the Court as to its own jurisdiction, which could only be upset by the parties on appeal. However, I need not enter into any discussion of that matter, because the suggestion that this order, if it be construed in the way in which in my opinion it ought to be construed, was in some way ultra vires, is one which, as I have already said, I am quite unable to accept.

The position, therefore, is this. The original order went when it was discharged by the order of October 9, 1933. The maintenance petition was dismissed ; and from October 9, 1933, onwards, there was not in existence any order for maintenance, and no petition asking for maintenance. The slate was clean. Neither the order nor the petition remained in a state of suspended animation—they were gone.

In that state of affairs the present application is launched. As I indicated some time ago, treating it as a new application, not linked up to some existing order of the Court, or to some pending application made in due time, it would be hopelessly out of time under the section. The argument as presented was one which, if I may say so, showed a true appreciation of

what I conceive to be the law upon this matter, namely, that if you are dealing with an application which, if it were a new application, would be out of time and beyond the jurisdiction of the Court, you must find a peg upon which, so to speak, you can hang it, a peg which had been put in place within the jurisdiction of the Court. I think that appears very clearly in *Stephen v. Stephen* (1), and I shall not be wasting time if I refer to that case and the nature of the question which there arose. An order was made by the Registrar upon application for maintenance for payment by the respondent to the petitioner by way of maintenance of the children of the marriage a certain sum. The order then proceeded as follows: "No order for maintenance of wife; but liberty to apply thereon." The matter came before the President, and eventually to this Court. One of the questions that arose was whether the words "liberty to apply" should be allowed to remain in the order. If I may put it in my own language, the vice of those words lay in the fact that the order appeared to contemplate that a subsequent application by the wife for maintenance would be one which the Court would have jurisdiction to entertain. Be it observed that, no order for maintenance having been made, no question could arise as to any variation; because the Court's power to vary depends upon there being in existence an order for maintenance which can be varied. The effect of putting in the words "liberty to apply" was to suggest that, notwithstanding there was no order for maintenance, the wife would be entitled at some future date to apply for such an order. If she had thereafter applied for such an order, it would, of course, have been a new application; because up to then no order had been made. It being a new application, she would be in the difficulty that it would not be an application for an order made "on" the divorce. This Court took the view that the insertion of the words "liberty to apply" was incorrect. It was pointed out that the proper, and indeed the only, method of preserving some right in the wife, in such circumstances, was to provide what I have called a peg upon which subsequent applications could

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be hung. Such a peg could be provided by making an order for periodic maintenance, in a nominal sum, which order would remain in force and would be susceptible of variation if the circumstances called for it. But, in the absence of such a peg, no future order could be made; and, therefore, the words "liberty to apply" would be meaningless and misleading.

I think that concludes all that I need say, but for one matter. The effect of the conclusion to which I have come is that those words should not have been put into the order, because they are not operative to confer upon the Court a jurisdiction which it did not possess. Once the order is discharged, the jurisdiction of the Court disappears. If these words, on their true construction, purport to confer upon the Court some jurisdiction to revive a discharged order, or to make a new order, notwithstanding that the previous order had ceased to be on foot, they would purport to confer upon the Court by consent a jurisdiction which is not conferred upon the Court by statute. In my opinion they are wrong from that point of view; and words of that kind should not be inserted in these orders in future—they are misleading and meaningless.

There is one further point, before I leave this matter, on the form of order, on which I should like to comment. I have already said that there is no jurisdiction in the Court to order payment to the wife of a lump sum. Such payment can only be consensual. That being so, I take the view that in such cases it is not desirable that the Court should direct the payment of such a lump sum, which is merely consensual. There is no necessity for the Court to be appearing by consent to be making an order which it has no jurisdiction to make at all. There are many other ways of providing for these matters. What the Court has jurisdiction to do is, of course, to discharge its previous order. The sum can be paid first, in which case all that is required is a recital in the order that such and such an agreed sum having been paid in full satisfaction, and an order by consent that the existing maintenance order be discharged. If the sum has not been paid, I see no reason why the order should not take the form that upon payment of the

sum the existing order should stand discharged, when the ordinary routine would be, as is the practice in another Division, that upon the party producing before the Registrar an affidavit verifying the payment, the existing maintenance order would be discharged. There are various methods of putting such an order into a perfectly effective shape, without adopting what to my mind is the objectionable course of inserting in the order a direction for payment which the Court has no jurisdiction to make under the statute.

The result is that the appeal will be allowed; and the application dismissed with costs here and below.

GODDARD L.J.: I agree; and I only want to add one word. We were told that the Divorce Court has for some time been adding to orders of this nature these words: "This matter not to be re-opened without leave of the Court." If that is so—I do not know whether it is so or not—I only know what I have been told by counsel in this case—it may have been thought that the decision of the learned President, Lord Merrivale, in *Olding v. Olding* (1), was some justification for those words being added. I think it should be pointed out, as I read that case, and as I read the decision of Bateson J. in *Jenkins v. Jenkins* (2) that those cases are no authority for the addition of those words at all. In neither of those cases was there a petition for maintenance.

In *Olding v. Olding* (1), the wife, having obtained a decree and come to an agreement with her husband, a Registrar's summons was taken out to secure an order embodying the agreement, with the consent of both parties, and the Court was asked to make an order. But there had been no petition presented for maintenance at all. The terms of the order made by Lord Merrivale were to make an order "in the terms of the summons, setting out that the parties had agreed to it, and that the petitioner would not be at liberty to file a petition for maintenance, or take like proceedings without the leave of the judge."

Bateson J.'s order in *Jenkins v. Jenkins* (2) was in rather a

(1) 46 Times L. R. 539.

(2) 46 Times L. R. 309.

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different form ; and, if I may say so, I think it was in the preferable form. There he made an order "By consent. "On the petitioner's undertaking not to file any petition for "maintenance, whether by way of variation of settlements or "maintenance hereafter, order in terms agreed." Some question might arise as to whether, if there is no application for maintenance, that sort of order can be made. It seems to me that, where the parties come to an agreement before the application for maintenance is made, the more preferable course would be for the wife to file an application for maintenance, and then on her application an order be made in the terms which my Lord has just pointed out. I can see difficulties, once a decree absolute has been made, in saying that the Court has power to make an order in the form that Bateson J. or Lord Merrivale made it. The difficulty is on what proceedings could they make such an order ? The suit is at an end, unless proceedings were taken for maintenance. It seems to me, therefore, that the right procedure is for an application to be made for maintenance and then for the Court to be informed that terms have been arranged and be asked to dismiss the petition on terms which have been agreed between the parties.

Appeal allowed.

Solicitors for the appellant : *Gordon, Dadds & Co.*

Solicitors for the respondent : *Withers & Co.*

P. J. B.

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May 2, 3.

Shipping — Collision — Navigation in Copenhagen Sound — Narrow Channel and Crossing Rules Regulations for Preventing Collisions at Sea, 1910, arts. 19 and 25.

The plaintiffs' and defendants' steamships came into collision in Copenhagen Sound, about 200 metres to the eastward and a little to the northward of the Lappegrund light vessel. When the vessels first sighted the lights of one another their position was such that under the crossing rule (art. 19) it was the duty of the defendants' vessel to keep out of the way. The defendants, however, alleged that the part of the waterway in which the collision occurred was a narrow channel, and therefore that art. 25 applied, under which each vessel had the duty to keep to her own starboard side of the channel.

In the Court below Langton J. held that on the evidence there before him the waterway in question ought not to be declared a narrow channel and held the defendants alone to blame for not obeying the crossing rule.

The defendants appealed. On the appeal they abandoned the contention that the narrow channel rule applied, admitted that they were to blame, but contended that the plaintiffs were also to blame for an alleged failure to keep their course and shaping to pass too close to the lightship :—

Held, on the facts, that the plaintiffs were not to blame. Judgment of Langton J., ante, p. 15, upheld.

APPEAL from a decision of Langton J. (1)

The plaintiffs were the owners of the steamship *Jeanne M.*, and her master and crew suing for their lost effects. The defendants were the owners of the steamship *Varmdo*. The collision took place in Copenhagen Sound, about 200 metres to the eastward and a little to the northward of the Lappegrund light vessel. The position of the vessels when they sighted each other's lights were that the *Varmdo*, having the port light of the *Jeanne M.* on her (the *Varmdo's*) starboard bow, under the crossing rule (art. 19) it was the duty of the *Varmdo* to keep out of the way.

It was alleged by the defendants in the Court below, however, that the part of the waterway in which the collision occurred was a narrow channel, and that art. 25 applied, under

(1) Ante, p. 15.

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which each vessel had the duty to keep to her own starboard side of the channel. Langton J. decided against the defendants' contention and held the *Varmdo* alone to blame for not keeping out of the way.

The defendants appealed, but did not contest the decision of the learned judge that the waterway was not to be regarded as a narrow channel. They admitted that they were to blame under the crossing rule, but contended that on the facts the *Jeanne M.* was also to blame for not keeping her course and for shaping a course which crowded the *Varmdo* in passing the lightship.

K. S. Carpmael K.C. and *E. W. Brightman* (for *H. L. Holman* on war service) for the appellants.

Gordon Willmer K.C. and *G. N. W. Boyes* (for *J. V. Naisby* on war service) for the respondents.

THE COURT (SIR WILFRID GREENE M.R., SCOTT and MACKINNON L.JJ.) dismissed the appeal, holding on the facts that the *Jeanne M.* was not to blame.

Appeal dismissed.

Solicitors for appellants: *Bentleys, Stokes & Lowless, for Bramwell, Clayton & Clayton, Newcastle-upon-Tyne.*

Solicitors for respondents: *Sinclair, Roche & Temperley, for Vaughan & Roche, Cardiff.*

E. C. M. T.

Considered. DUNN v. DUNN. [1948]
2 All E.R. 822.

Considered. DUNN v.
D. [1949] P. 98

MANSEY v. MANSEY.

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April 9.

Divorce—Desertion—Cross-charges of desertion—Husband's genuine offer of home—Wife's duty to accept—Decree nisi for husband—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 176 (b)—Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), s. 2.

If a husband offers his wife a suitable home in the place where he wants to live and there is no question of his doing so to spite her, the wife is under the necessity of sharing that home with him. If she refuses, she commits the matrimonial offence of desertion.

HUSBAND'S PETITION for dissolution of marriage.

By his petition, Mr. Arthur Mansey, of Liverpool, an officer in the mercantile marine, sought the dissolution of his marriage with Mrs. Helen Mary Mansey on the ground that for a period of at least three years immediately preceding the date of the petition, namely, continuously since November 28, 1934, the respondent had deserted him without just cause.

The petitioner prayed for relief in the exercise of the discretion notwithstanding his own adultery.

By her answer the respondent denied desertion, charged the petitioner with deserting her since November 28, 1934, and prayed for a decree of judicial separation.

The marriage took place on May 11, 1924, at the Church of Our Lady of Lourdes and St. Bernard. There are two children of the marriage, both daughters.

Allister Hamilton for the petitioner.

W. T. Fielding for the respondent.

1940. April 9. HENN COLLINS J. This is the petition of Arthur Mansey for the dissolution of his marriage on the ground of his wife's desertion. The wife, by her answer, denies that desertion, and asserts that it was the husband, the petitioner, who deserted her, and she assigns for that event November 28, 1934, as its date, that being the date which the petitioner

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also alleges as the date of the desertion by his wife. The wife, by her answer, has a cross-prayer for judicial separation on the ground of that alleged desertion.

That brings into prominence the date that I have named, November 28, 1934, and though it is not the logical sequence of events I am proposing to deal with the wife's answer first ; and for the moment I am going to assume that on November 28, 1934, it was the husband who deserted. If that were the position, it is necessary to see whether he has made, after that event, a bona fide offer to resume cohabitation in such circumstances that his wife ought to have accepted it. One cannot look at the correspondence which passed between the petitioner and his wife and between their respective solicitors from and after the end of November, 1934, without seeing that he was making repeated offers to his wife to induce her to live with him. I have to ask myself whether those offers were made in good faith, whether they were such as the wife ought to have accepted, or whether they were just put forward for the purpose of inviting a refusal from the wife, being themselves such that she ought not to be expected to accept and wholly lacking in sincerity.

I do not think there is any sufficient colour for the suggestion that the husband was not acting in good faith. He put forward, as he had put forward before November 28, accommodation at a boarding house kept by a Mrs. Smith. It is common ground that that accommodation was in itself perfectly suitable, and I think, exceptionally good of its class. The wife seems to have taken up the position that she was entitled to dictate to her husband where he should live.

The rights of a husband as they used to be have been considerably circumscribed in favour of the wife without very much, if any, curtailment of his obligations, but we have not yet got to the point where the wife can decide where the matrimonial home is to be, and if the husband says he wants to live in such and such a place then, assuming always that he is not doing it to spite his wife and the accommodation is of a kind that you would expect a man in his position to occupy, the wife is under the necessity of sharing that home with him.

If she will not, she is committing a matrimonial offence : she is deserting him.

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I am perfectly satisfied that the husband after November 28, was making offers in good faith and offering accommodation elsewhere which he was prepared to occupy had his wife come to him there. In those circumstances if there had been desertion on November 28 by the husband he had put an end to it by his subsequent offers of alternative accommodation, all of which the wife refused, first on one ground and then, as that was met, enlarging the ambit of her objection. However that may be, she did not accept what, in my view, she was bound to accept, the accommodation which her husband was offering or, if one prefers the phrase, dictating, as he was entitled to do.

That, of course, disposes of the wife's cross-prayer even on the assumption most favourable to her, that it was her husband who deserted her on November 28. But did he desert her? He sent away the furniture from the house on that date, and in that sense broke up the home. If, in so doing, he had turned his wife into the street without making any provision for her I can well understand the Court saying, "Well, that is desertion"; but that is not the impression left on my mind at all as to what happened on that date.

I find it scarcely surprising that their relations were uneasy, for the wife, as long ago as April, 1928, first thought of getting a separation from her husband, and she was always of that mind, with this important proviso from her point of view that she should have a measure of control over the children, access to them and, I think, above all, provision made for herself.

That desire for a separation expressed itself in a succession of futile applications to justices on one alleged complaint or another, all of which failed, and in January of 1934 she settled down, with what grace she could gather, to live the married life. The husband says that during that period she was refusing to cook for him, not applying his money to the proper maintenance of the household, and that he was driven, if he was to live with her ashore, to taking the household

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management out of her hands, and therefore driven to living in a boarding house.

But the husband would have been entitled, in the bona fide exercise of his discretion, to leave his home and live in a boarding house without entitling his wife to say, "Well, I am not going there," assuming always, as I have said, that the accommodation was suitable to her station of life.

In those circumstances I am perfectly certain that the desertion was not by the husband, and that entitles him to a decree in his favour, in the exercise of the discretion of the Court, it being quite clear that what he has admitted in his discretion statement had nothing whatsoever to do with the breakdown of this marriage.

His LORDSHIP pronounced a decree nisi in favour of the petitioner.

Solicitors : *Helder, Roberts, Giles & Co., for John A. Behn, Twyford & Reece, Liverpool ; Stocken, May, Sykes & Dearman, for Wright, Becket & Pennington, Liverpool.*

W. L.

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May 6, 7.

Shipping—Limitation of liability—Hirer of barge who has undertaken "sole charge and management"—Barge owner responsible for wear and tear—Fault or privity of hirer—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503—Merchant Shipping Act, 1921 (11 & 12 Geo. 5, c. 28), s. 1.

By s. 503 of the Merchant Shipping Act, 1894, the owner of a ship shall not, where without his actual fault or privity loss or damage is caused to goods on board the ship, be liable beyond an aggregate amount not exceeding 8*l.* for each ton of his ship's tonnage; and by s. 1, sub-s. 2, of the Merchant Shipping Act, 1921, this right of limitation is extended to the hirer of any barge "who has contracted to take over the sole charge and management" thereof and is responsible for the navigation, manning and "equipment thereof."

In March, 1937, the plaintiff hired a barge on the terms that the barge owner would not be liable for the consequences of any defect, whether patent or latent, existing at the time of hiring or subsequently appearing, and that the hirer must satisfy himself as to seaworthiness and fitness, and be responsible for all damage or injuries done by the barge while on hire. The owner, however, had to maintain the barge and make good all damage to her due to wear and tear.

On November 14, 1938, the barge loaded a cargo, and on the following morning was found to be water-logged, having leaked during the night owing to a hole in her chime angle due to wear and tear, and the cargo consequently was damaged. The plaintiff had never inquired when the barge had last been blocked for purposes of survey, which was in fact in March, 1936, and he said that he always blocked his own barges every two years.

The plaintiff sought to limit his liability. The defendants, the owners of the cargo, contended that the plaintiff had not got the sole charge and management of the barge within the meaning of the Act of 1921, and, further, that the accident did not happen without his fault or privity.

Bucknill J. decided both questions in favour of the plaintiff. On appeal:—

Held, (a) that the plaintiff was liable to third parties if the barge was unseaworthy, and did not cease to have sole charge and management merely because he had an arrangement with the owner of the barge whereby the latter was responsible for upkeep, and that the plaintiff was within the terms of s. 1 of the Act of 1921; but,

(b) that, having made no inquiry as to when the barge had last been surveyed and taken no steps at any time to ascertain her condition, the plaintiff had not discharged the onus upon him of establishing that the damage occurred without his actual fault or privity; and that on this ground the appeal succeeded.

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Judgment of Bucknill J. (ante, p. 31) on this point reversed and the action for limitation dismissed.

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DEFENDANTS' APPEAL from Bucknill J. (ante, p. 31), in an action for limitation of liability.

The plaintiff, Thomas Arthur Scanlan, sought to limit his liability in accordance with the provisions of the Merchant Shipping Acts to an amount not exceeding 8*l.* per ton on 73½ tons, the registered tonnage of the *Thames*, an open steel barge, of which he was the hirer, for damage and loss caused to cargo by the barge being in a defective condition. The defendants were G. A. Bunting & Co., and all others the owners and parties interested in the cargo.

On November 14, 1938, the barge loaded a cargo belonging to the first defendants in the Regent's Canal Dock. She was left unattended during the night, and on the following morning was found to be waterlogged, having leaked during the night, in consequence of a defect in her chime angle, and the cargo consequently was damaged.

The plaintiff had hired the barge from Messrs. W. H. Donovan & Co., the owners, on the following terms, which appeared on Donovan's bills: "Barge hiring conditions—
"We hereby give notice that we will not be liable for the
"consequence of any defect whether patent or latent in our
"barges or the gear belonging thereto existing at the time of
"hiring or subsequently appearing therein. Hirers must,
"therefore, satisfy themselves by examination as to sea-
"worthiness and fitness in all respects for the purpose for
"which they are required before taking possession thereof.
"Every barge is let upon the conditions that the hirer shall
"be responsible for all damage or injuries whatsoever done
"by or received by such barge while on hire"

The plaintiff had hired the barge in 1933, 1934 and 1935 for short periods, and, in March, 1937, hired her again, at first at a daily rate and subsequently at a cheaper monthly rate. As the printed hiring conditions did not deal with the duty of keeping the barge in a seaworthy condition, it was verbally agreed that the owners should make good all damage

due to wear and tear. The plaintiff in his evidence said that he knew the reputation of Donovans and did not ask when the barge had last been blocked, which in fact had been in March, 1936. In the case of his own barges the plaintiff said that he blocked them for purposes of survey every two years. Up to the time of the damage occasioned by the leak the barge had carried perishable cargoes without mishap.

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The plaintiff alleged that as hirer he undertook to take over (in the words of s. 1 of the Merchant Shipping Act, 1921) the sole charge and management of the barge, and was responsible for her navigation, manning and equipment, and, therefore, that he was entitled to the right of limiting his liability which that section provided.

The defendants alleged that the plaintiff did not come within that class of persons for whose benefit the Merchant Shipping Act, 1921, was passed; but if, on the other hand, it could be said that the plaintiff did take over the sole charge of the barge, and was within the terms of the statute, he was privy to the cause of the loss.

Bucknill J. held that the plaintiff was right on both points, and pronounced for a decree of limitation as prayed. The defendants appealed.

Gordon Willmer K.C. and *G. N. W. Boyes* (for *J. V. Naisby*, on war service) for the appellants. The learned judge was wrong on both questions. The plaintiff is in this dilemma. Either he was responsible for the upkeep of the barge and did nothing; or, if not responsible, he is not within the terms of s. 1, sub-s. 2, of the Act of 1921. It is submitted that he did not take over the sole charge and management, the important word being "sole."

[MACKINNON L.J. Was he not a charterer by demise?]

The point was not pleaded, and the Court below was not invited to deal with it. In any event, in the absence of a properly signed instrument in writing it is doubtful if there could be a charter by demise: see *Cory (William) & Son, Ltd. v. Dorman, Long & Co., Ltd.* (1)

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The learned judge treated the barge owner as the agent of the hirer as regards upkeep, and took the analogy of the hirer entrusting the work to a ship repairer ; this is a false analogy. The question is, had the plaintiff, considering the terms of the arrangement, between himself and Donovans, that sort of control which the statute contemplated, and it is submitted that he had not.

If, however, the plaintiff is within the Act of 1921, he has not discharged the burden imposed by s. 503 of the Merchant Shipping Act, 1894, of proving that the damage happened without his actual fault or privity. The onus is upon him : *The Bristol City* (1) ; see also *Standard Oil Co. of New York v. Clan Line Steamers, Ltd.* (2) He did not make any inquiry of Donovans as to when the barge had last been blocked nor did he inspect her himself, she might have leaked on her first voyage for all the plaintiff knew, and month after month time was running against her.

G. St. C. Pilcher K.C. and *Waldo Porges* for the respondent. The words in s. 1, sub-s. 2, of the Act of 1921 are "sole charge "and management." "Charge " merely denotes possession and in no reported cases dealing with charterparties has it been held that "management " includes maintenance : as to the meaning of default in management : see *Gosse Millard, Ltd. v. Canadian Government Merchant Marine.* (3)

The plaintiff had possession and control and, in the ordinary sense of the words, "sole charge and management," fair wear and tear excepted, which is the almost universal clause in chartering contracts. The contract here really amounted to a charter by demise. If the barge was unseaworthy, as in fact she was, it is no answer to the cargo owners to say that the hirer is not liable for the condition of the hull ; the arrangements between the hirer and the barge owner as regards upkeep, qua the cargo owners, are unimportant.

On the second question, the plaintiff omitted no precautions which a reasonable man should have taken. He had hired barges from Donovans for many years and was entitled to

(1) [1921] P. 444, 453.

(2) [1924] A. C. 100.

(3) [1929] A. C. 223.

rely on them. There was nothing in the history of the barge to lead the plaintiff to suppose that there was anything the matter with her. Donovans were responsible for her proper maintenance and the defendants' cargo was damaged by the failure to maintain. In these circumstances it cannot be said that the plaintiff was in any way privy to the damage.

Gordon Willmer K.C. was called on to reply on the first point only.

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SIR WILFRID GREENE M.R. This appeal raises two separate points. The first question which arises is whether the present respondent, the plaintiff in the action, is a hirer who had contracted to take over the sole charge and management of the barge *Thames* and was responsible for the navigation, manning and equipment thereof within the meaning of s. 1, sub-s. 2, of the Merchant Shipping Act, 1921.

The terms of the contract made between the owners of the barge and the plaintiff, so far as relevant to the present question, are found by the learned judge as follows. After referring to a document containing what purported to be barge hiring conditions, which the parties agreed did not contain all the terms of the hiring, the learned judge says: "Those terms, of course, "had not to deal with the duty of keeping the barge in sea-worthy condition during the term of the hire which, in this "case, went on from March, 1937, until November, 1938. "It appears to be a verbal term of the agreement that the "owner shall make good all damage to the barge which is "due to wear and tear." The damage in question in this case was due to wear and tear and accordingly it fell on the owners of the barge to make good that damage. What appears to be the view of the parties as to their contractual obligations in that matter may be explained by two short references in the evidence. One is in the evidence of Mr. Scanlan: "(Q.) Would you have considered that Messrs. "Donovan & Company had the right to write to you or ring "you up and say: 'Now the *Thames* is due for blocking " 'you must send her round so that we can put her on her "'blocks'? (A.) Yes, they would do that. (Q.) They had

C. A. "the right to do that? (A.) They had the right to do that,
1940 "yes." Then Mr. Donovan himself is asked this: "What
THE "would you have done if Mr. Scanlan had kept her on till
THAMES. "now? (A.) I should have asked him to return the barge for
Sir Wilfrid "painting and overhaul, and blocking." The learned judge
Greene M.R. did not in terms find what were the rights of the owners in
respect of calling for the return of the vessel for the purpose
of repairs, but I will take it, as appears to be right from the
passages I have cited, that the owners could call upon the
hirer, Mr. Scanlan, to hand the barge back to them for the
purpose of carrying out such repairs as the owners under the
contract were bound to carry out; that is to say, repairs for wear
and tear, but not repairs for such things as collision damage.

Now that being the nature of the contract between the
parties, the question arises as to the applicability of s. 1,
sub-s. 2, of the Merchant Shipping Act, 1921. The words which
I have already quoted from that sub-section are found in the
definition of the word "owner" in the sub-section, and it is
to be observed that in order that a person who is not an
owner but a hirer may fall within the definition of "owner"
he must show that the contract between him and the owner
is one having the character mentioned in the sub-section;
that is to say it must be one under which the hirer takes over
the sole charge and management of the vessel and is responsible
for the navigation, manning and equipment thereof.

Before I deal with that very short point, it should be borne
in mind that in the original statutory provisions with regard
to the limitation of liability, the persons who had the benefit
of the right to limit their liability were the owners of ships.
The same advantage was extended to the owners of docks,
and by s. 71 of the Act of 1906 the word "owner" was extended
to include a charterer by demise. The legislature with
commendable celerity had succeeded in enacting that section
while a particular piece of litigation was passing between the
Court of first instance and this Court and the House of Lords,
because in view of the decision of the House of Lords that
enactment appears to have been unnecessary. Down to this
point we have got the benefit extended to owners and to

persons who with regard to the practical objects of the principle of limitation are really in the same position as owners—charterers by demise. When one comes to the Act of 1921 the expression “ship” in the earlier Acts is extended to cover every description of lighter, barge or vessel used in navigation in Great Britain, however propelled, with a proviso which I need not read. The owners of such vessels, of course, come under the benefit of the Act in respect of limitation without any difficulty ; but the Legislature was minded, in extending the benefit to this class of vessel, not to confine it to the case of an owner in the strict sense, but to extend it to certain categories of hirers, just as the Legislature in 1906 had extended “owner” to a certain category of charterer, and the category of hirer is the one who complies with the words which I have cited and has got a contract giving him the sole charge and management of the vessel and so forth.

The learned judge took the view that the hirer in this case had taken over the management, and he held that the word “management” must include the duty to maintain the barge in a reasonably seaworthy condition. The importance of that finding lies in this, that under the contract between the parties the duty to maintain the barge in a reasonably seaworthy condition so far as wear and tear was concerned lay upon the owner and not upon the hirer. It would appear, therefore, that down to that stage the learned judge’s view was that Mr. Scanlan, not having taken over that part of the management which consisted in maintaining the barge in respect of wear and tear, could not bring himself within the language of the sub-section ; but he goes on to say that a man may still have sole charge and management notwithstanding the fact that by arrangement with the owner the owner is responsible for the repairs to the barge.

I am not quite sure whether I can agree with the whole course of the learned judge’s reasoning, but it is perhaps more convenient that I should express in my own language the reasons, quite shortly, which have led me to agree with his conclusion. His conclusion was that Mr. Scanlan was a hirer of this barge within the meaning of the sub-section.

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The Legislature apparently was seeking for a form of words in relation to a class of vessel which is not ordinarily subject to charter, still less to charters by demise, which would describe in appropriate language a degree of control and a position analogous to that enjoyed by a charterer by demise. It is obviously a complete and practical type of control which the Legislature is endeavouring to describe. Of course, contracts between owners and hirers may include all sorts of terms. Owners may reserve to themselves some right to interfere in some way with the hirer with regard to some particular matter ; it may be that they reserve the right to paint the vessel periodically or the right to have her surveyed or to do a variety of things. The contract may go further. It may impose upon them a duty for the benefit of the hirer as well as for their own to carry out work of that kind. It seems to me, in order to give the true effect to this sub-section, that the particular contract must be examined in order to see whether or not rights of that character reserved to the owner, or duties of that character imposed upon the owner, are of such a nature as to make it impossible to say of the hirer under the contract that he has taken over the sole charge and management. I agree with the way in which the learned judge expresses it when he says : "I am not prepared to say that he ceases to be "a man who has sole charge and management of the barge, "because he has this arrangement with the owner by which "the owner is responsible to keep the barge in proper repair." In other words, if you find a case of a man who hires a barge and runs it himself and puts his own crew upon it, navigates it and does everything in connection with it that an owner would do, the mere circumstance that under the contract a particular type of repair falls to be carried out by the owner does not, in my view, make the contract any the less one which hands over to the hirer the sole charge and management within the true meaning of the sub-section. In this case Mr. Scanlan had for all practical purposes complete and effective control and possession of this barge. On occasions which had never been agreed or indeed stipulated for in any precise language, it was no doubt true that the owner could ask for that barge

to be sent back to him for a specific purpose, namely, for putting right the wear and tear. That fact does not appear to me to alter the circumstance that Mr. Scanlan had sole charge and management within the meaning of the sub-section.

Accordingly, in my opinion, the learned judge upon this point was right, although, as I have said, there are some points in his reasoning which do not commend themselves to me.

The second question is whether or not Mr. Scanlan has succeeded in discharging the onus which lies upon him, when he seeks to limit his liability, of showing that the occurrence took place without his actual fault or privity within the meaning of s. 503 of the Merchant Shipping Act, 1894. The learned judge in dealing with this question in his judgment formulated it, if I may say so with respect, the wrong way round, because the question which he set himself he answered in this way: "I cannot on the facts of this case say that this "damage was due to his fault or privity in any way." I am willing to assume that the fact that the learned judge formulated the question in a way which suggests that he was regarding the onus as being different from what it was, does not really vitiate his conclusion, and that what he really meant was that the terms of the section had been complied with.

The first matter which must be examined is the nature of the relationship between Mr. Scanlan, as hirer, and Mr. Donovan, or, rather, his company, as owner, with regard to which I have already said something on the first point. The position as between those two gentlemen was this. At the moment when the barge was taken over Mr. Scanlan became subject to the relevant written condition which is in the following terms: "We hereby give notice that we will not be "liable for the consequences of any defect whether patent or "latent in our barges or the gear belonging thereto existing "at the time of hiring or subsequently appearing therein. "Hirers must, therefore, satisfy themselves by examination "as to seaworthiness and fitness in all respects for the purpose "for which they are required before taking possession thereof." Mr. Scanlan, therefore, was taking on hire a barge with regard to which the owner was accepting no liability and giving no

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C. A. guarantee with regard to its condition and, in particular, to
1940 its seaworthiness. He knew, therefore, that if any mischance
occurred owing to a lack of seaworthiness of the barge he would
not be entitled to call on Mr. Donovan to give him any sort of
indemnity for any damage which might ensue. That damage
he knew would fall upon his own shoulders.

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It is true that in point of fact Mr. Scanlan did what, from a business point of view, may have been a reasonable thing to do in the matter of running risks; he paid not the slightest attention in practice to that clause. He said to himself, if one may put his mental processes into words: "True it is that "I am put on my guard according to the terms of the contract; "true it is that the entire risk of unseaworthiness at the time "of taking over is mine and I have no right in any circumstances "to call Mr. Donovan to account for it; nevertheless I am "sufficiently confident in the way Donovans run their business "that I am prepared to run the risk and I will not look at the "barge." As between business people whose reputation is known to one another it may be a reasonable business risk to take in circumstances of that kind, but it must never be forgotten that a person who hires a barge and takes a risk of that kind takes it in contemplation of carrying other people's goods in that barge, and if the barge turns out to be unseaworthy the other people's goods may be injured, a thing which would not happen if the business risk were not taken.

The next matter to remember with regard to the terms of the contract is that the duty to make good wear and tear and to pay the expense so incurred lay upon Mr. Donovan. That does not mean that if loss occurred through wear and tear Mr. Donovan, as between himself and Mr. Scanlan, was liable to pay for that loss. It is not suggested in the present case that under the terms of the contract between them Mr. Scanlan can pass on to Mr. Donovan the liability for the damage caused by this defect due to wear and tear. Mr. Donovan did not undertake to indemnify against loss incurred through wear and tear, but merely undertook as a term of the contract to put wear and tear good when it was found to exist, a thing which might occur before a mischance had happened, or after.

So far as Mr. Donovan's liability is concerned, it would make no difference. His only obligation was to put right that defect at his own expense. Again, therefore, Mr. Scanlan knows that if he is carrying goods for somebody which are injured through wear and tear, he cannot call upon Mr. Donovan to bear the expense of that loss.

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The third matter in the contractual relationships which it is important to have in mind is the question of periodical inspection and, if necessary, overhaul. The contract on that point was left rather vague, but it appears to be certain that Donovans, when they thought the time had arrived, would in practice be entitled to ask for the barge to be sent in for inspection. The parties also seem to have regarded Mr. Scanlan as being entitled, when the proper time arrived, to call upon Donovans to inspect her and do any necessary repairs in the matter of wear and tear. That a clause to that effect must be found somewhere in the contract seems to me to be without question, because without it it would be impossible in practice to give effect to Donovan's admitted obligation to see that wear and tear is made good. They cannot do that unless they have the opportunity of inspection. The exact period at which Mr. Scanlan might be entitled to call for an inspection is a matter upon which the parties never seem to have agreed, but for present purposes I do not think that matters, because if the contract that Mr. Scanlan made with Donovans did not put him in a position to obtain the necessary assurance from time to time as to the condition of the barge that he was hiring, it seems to me that in making that contract he has omitted to make provision for an obvious matter of risk and danger for which he ought to have made provision. That he did not do. Nevertheless, the standard which he set for himself is not open to doubt. It appears in two or three questions and answers put to him by the learned judge at the conclusion of the examination by counsel. "(Q.) I gather you to say that, "in the case of your own barges, you do block them every "two years? (A.) We block them every two years. (Q.) And "if the *Thames* belonged to you would you block her every two "years? (A.) Yes, my Lord, that is correct. (Q.) Do you

C. A. "sometimes let it run on for more than two years or are you
1940 "pretty strict about it? (A.) We are pretty strict about it.

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(Q.) Have you ever hired a barge for as long as two years?
(A.) Yes, longer in my father's time. (Q.) Supposing the
"Thames had been on hire with you for more than two years
"without her being blocked, what would you have done?
(A.) We should ask him, What about seeing to this barge,
"as we should have to rely on him as to whether the barge
"was quite good on the bottom, or otherwise. (Q.) Would
"you have considered that Messrs. Donovan & Company had
"the right to write to you or ring you up and say: 'Now
"the Thames is due for blocking, you must send her round
"so that we can put her on her blocks'? (A.) Yes, they
"would do that." Those last two questions and answers
as they impressed themselves upon the mind of the learned
judge appear in his judgment.

What do these answers mean? They mean, surely, that
Mr. Scanlan would have considered it right and proper for him
after two years to call upon Donovans to do something about
seeing to the barge. If this mischance had taken place after
the expiration of two years from the commencement of the
hiring—I do not mean to the day, but substantially two years—
Mr. Scanlan could scarcely have said, "I acted reasonably
"without any fault in omitting to secure what under my
"contract I conceived myself entitled to secure, namely, a
"proper inspection by Donovans of this barge and the execution
"of any necessary repairs." His omission to see that the
barge was looked at by somebody at the end of two years
would, in my judgment, quite clearly have been a fault, and
out of his own mouth he would have fallen short of what,
as a practical and prudent bargeowner and hirer, he ought to
have done. But in the present case he had not had the barge
for two years. He had had it on hire for one year and eight
months. If a man regards it as a proper and prudent
course to see that his barge is inspected and, if necessary,
repaired every two years, it seems to me quite impossible to
decline to take the further step of saying that he ought, in
order to put himself in the position to know when the time for

inspection has come, to acquaint himself with the date of the last inspection. If he omits to do that he has no terminus a quo from which to calculate his two years. For all Mr. Scanlan knew those two years might have elapsed at the beginning of the first six months, or the first year, or the first eighteen months of the hiring. He never bothered to inquire, and accordingly he never put himself into a position of knowing when the last inspection had taken place or when the two-year period, which he sets as his own standard, would come to an end.

Why did not he do that? Before I answer that question it is right to add that this further point, which I have already observed, that he took the barge over on the written term under which Mr. Donovan repudiated any liability whatsoever as to the condition of the barge at the time it was let. Mr. Scanlan, therefore, at that moment of time was taking over a barge as to the state of which the owner gave no warranty whatever, but placed the responsibility on the hirer, and without having any knowledge whatsoever as to the date of the last inspection which alone could give him the necessary point of departure in time for calculating what he, as a prudent barge-owner, regards as a proper period, namely, two years. His reason for doing that was simply this: "We persons concerned 'in barges trust one another. We regard the people from 'whom we hire barges as people who do not knowingly 'send out a barge in a bad condition or a barge in such a 'state that she ought to be inspected.'" The trouble about that practice is that it may work very well, but the day comes when somebody may make a mistake, and there has been a mistake here. The question we have to decide is whether in those circumstances Mr. Scanlan has discharged the onus of showing that this occurrence took place without his actual fault or privity.

In considering the bearing of the facts which I have mentioned upon the language of the section one further circumstance must be born in mind. In what I may call the lay-out of Mr. Scanlan's operations there was no person on whom the obligation rested of seeing to the condition of a barge hired by him,

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C. A. at any rate the condition of the under-water part of its hull,
1940 except Mr. Scanlan himself. He employs a lighterman, but
THE it is no part of the lighterman's job delegated to him by
THAMES. Mr. Scanlan to concern himself with the condition of the bottom
plates, and so forth, save in so far as their condition makes itself
Sir Wilfrid apparent by leakage or something of that kind. There is
Greene M.R. no question here of the delegation of any sort to anybody of
the duty to satisfy himself on this particular type of matter.
It was Mr. Scanlan's job, nobody else's, and he, being a person
who, under the organization of his business, takes upon his
own shoulders the responsibility for looking after that sort of
thing, he did not look after it ; he did not examine the barge
when he took her over, he did not make any inquiry which
would enable him to carry into effect what he regards as the
prudent practice of a two-yearly inspection ; in fact he did
nothing. The reason that he gives is this : "I only did what
"other persons interested in barges do. I left it to the other
"fellow and that is the reasonable thing. It is done every
"day." We were asked to say that a person who succeeds in
showing that he acted reasonably in that sense, namely, that
he took the sort of risk that people in the same line of business
take every day, has discharged the onus which lies upon him
under the section. I am quite unable to accept any such view
of the meaning of this section.

I have gone in some detail into an examination of exactly
what took place because I am differing in this matter from
the conclusion to which the learned judge arrived. His
conclusion is summarized in these words. I will read two
passages. The first one is : "There was nothing whatever
"in the history of the barge to lead any one to suppose that
"there was anything the matter with her, and, indeed, when
"she was blocked, apart from this one small hole, in this one
"particular place, there was nothing to show that she required
"blocking even then." The next passage is : "I cannot say
"that, in my view, he"—that is Mr. Scanlan—"did anything
"which a reasonably prudent owner would not have done,
"relying as he did on Mr. Donovan to supply him with a
"seaworthy barge, knowing the history of the barge, having

"had it for a long period of time, and having nothing to direct his attention to this most unfortunate state of the chime angle at this particular spot." In my judgment the reasons given by the learned judge for finding that Mr. Scanlan acted as a reasonably prudent owner would have done cannot stand. He says that Mr. Scanlan knew the history of the barge. Unfortunately, in a most vital respect he did not, because he did not know the date when she was last blocked. Actually, the only matter of history that he knew was that he had hired the barge on certain previous occasions and she was a perfectly good barge and never exhibited any defects. With great respect to the learned judge, I cannot see that knowledge of the history of the barge of that kind really assists the case. The fact that Mr. Scanlan had had nothing to direct his attention to "the unfortunate state of the chime angle" shows the merit and desirability of periodic inspections which are designed for the very purpose of discovering defects which are not likely to make themselves apparent before they develop to such a point that some injury takes place. In point of fact there is no question that had this barge been examined at the expiration of two years from her previous examination this defect would have been apparent. The reason that nothing directed his attention to any defect was that the water had not yet begun to come through the bottom, and another reason was that nobody had been down to look at it. With all respect to the learned judge, I cannot regard those circumstances as matters which can be relied upon in this context.

I have already pointed out that in relying upon Mr. Donovan, Mr. Scanlan deprived himself of the one test which he regarded as a proper test for the prudent bargeowner or hirer to apply, namely, the two-year period of inspection. He shut his eyes to the essential fact which it was necessary for him to know to enable him to apply that test. It cannot, in those circumstances, be said that his action was the action of a reasonable person on this point.

On this point, therefore, the appeal succeeds, and the result is that the action for limitation will be dismissed.

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SCOTT L.J. I agree. I will only add a few words about the sentence which follows the one in the learned judge's judgment which my Lord has read. The sentence to which it is appended is this: "But, at the same time, I am not "prepared to say that he ceases to be a man who has sole charge "and management of the barge, because he has this arrange- "ment with the owner by which the owner is responsible to "keep the barge in proper repair." The next sentence seems to me to be a mere illustration of the view that he is there expressing: "It seems to me"—and I insert the words "for "instance" in order to explain my meaning—"that the hirer "might have a contract with a ship repairer to do that for him, "and nevertheless would be the man who had sole charge and "management of the vessel," and, if I may add, the learned judge has the further sentence in his mind, though he does not express it, "and so he might have a similar contract with the "owner." If you read the whole of that sentence in that way I think it fits in with the preceding part of his judgment. Otherwise, I entirely agree on both questions with what my Lord has said.

MACKINNON L.J. I agree, and I do not think I need add anything.

Solicitors for appellants: *Waltons & Co.*

Solicitors for respondent: *Keene, Marsland, Bryden, Besant, Batham & Cork.*

E. C. M. T.

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April 23.

Shipping—Collision—Life salvage—Collision between two vessels—Subsequent collision with third vessel attempting to save life—Second collision occurring without negligence—Duty to save life—Voluntariness—Vessel to blame for first collision responsible for damage to vessel rendering life salvage services—Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), s. 6.

The plaintiffs' motor launch *D.* proceeding up the river Thames, saw two vessels in collision, the tug *G.* and the motor ship *D.M.* The *G.* was very seriously damaged and began to fill. Shouts for assistance were heard and accordingly the *D.* ran in under the stern of the *D.M.* and rounded across the bows of the *G.* to save the lives of those on board. The *D.M.* was still in the hole she had made in the side of the *G.*, and when she backed out so that the *G.* could beach herself, the *G.*, which still had slight headway, struck the *D.* and damaged her.

The *D.* sued both the *G.* and the *D.M.* The *D.M.* had admitted liability for the collision between herself and the *G.*, and the Court held that the collision between the *G.* and the *D.* occurred without negligence on either side. By s. 6 of the Maritime Conventions Act, 1911, "the master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel . . . render assistance to every person, even if such person be a subject of a foreign state at war with His Majesty, who is found at sea in danger of being lost, and, if he fails to do so, he shall be guilty of "a misdemeanour."

Held, that in going to the assistance of the *G.*, the *D.* was under a duty and was not a volunteer; that the *D.M.* owed a duty to the *D.* not to be negligent just as much as she owed a duty to any other vessel lawfully navigating the river; that in going to rescue those on the *G.*, who were in imminent peril, the doctrine of the assumption of risk did not apply; that there was no *novus actus interveniens* to break the chain of causation, and that everything which took place after the first collision followed naturally and properly as a result of that collision; and that accordingly the plaintiffs were entitled to judgment against the owners of the *D.M.*

Principles laid down in *Haynes v. Harwood* [1935] 1 K. B. 146 applied.

ACTION of damage by collision.

The plaintiffs were the owners of the motor launch *Daphne*. The defendants were (i.) the owners of the steam tug *Gusty* and (ii.) the owners of the motor vessel *Daniel M.* The collision, which took place in Greenwich Reach, River Thames, on August 16, 1939, followed on a collision between the *Gusty*

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and the *Daniel M.* for which the owners of the *Daniel M.* had admitted liability. The facts are fully set out in the judgment.

Waldo Porges for the plaintiffs. Both the defendants are to blame for the collision. The *Gusty* did not take off her headway, and the *Daniel M.* either saw or ought to have seen the position of the *Daphne*, and yet she backed away from the *Gusty* instead of holding her.

Alternatively, there was so short an interval between the two collisions that it may be they should be treated as one, in which case the *Gusty* is not to blame and all the fault is upon the *Daniel M.* which has admitted liability for the first collision. The defendants ought to contemplate that following a serious collision, some vessel, in this case the *Daphne*, would come up to save life, and the damage suffered by the *Daphne* is the natural consequence of the defendants' negligence: see *Haynes v. Harwood* (1) and *Scaramanga & Co. v. Stamp*. (2) The master of the *Daphne* was under a duty to go to the assistance of the *Gusty's* crew, who were in peril of their lives: see s. 6 of the Maritime Conventions Act, 1911.

K. S. Carpmael K.C. and *G. N. W. Boyes* (for *J. V. Naisby* on war service) for the first defendants were not called on.

R. F. Hayward K.C. and *H. E. G. Browning* for the second defendants. The circumstances in *Haynes v. Harwood* (1) were very special. The constable in that case was injured by incurring a risk in the course of his duty. The *Daphne* came to the assistance of the *Gusty* as a volunteer, and the *Daniel M.* owed no duty to the *Daphne* when that vessel was first seen on the south shore. The turning of the *Daphne* in the river and coming round on to the side of the *Gusty* constituted a novus actus interveniens, and the first collision cannot be said to have been the proximate cause of the second collision: see *The Paludina*. (3) In any event the *Daphne* was negligent in manœuvring across the bows of the *Gusty* when the latter ship had headway.

(1) [1935] 1 K. B. 146.

(3) [1927] A. C. 16.

(2) (1880) 5 C. P. D. 295, 304.

BUCKNILL J. This is a claim by the owners of the motor launch *Daphne* against two defendants, the owners of the steam tug *Gusty* and the owners of the motor vessel *Daniel M.*

The *Daphne* is a wooden motor launch 40 feet in length, 8 feet in beam, and fitted with engines of 40/50 horse power, and, at the time of the collision, was manned by a crew of three hands.

The *Gusty* is a steel screw steam tug of 62 tons gross, 71 feet long and 18 feet beam, and, at the time of the accident, had a crew of four hands and a passenger, a Mr. Purt, on board.

The *Daniel M.* is a steel screw motor ship of 448 tons, 149 feet long, 26 feet beam, and at the time of the collision was manned by a crew of seven hands.

The damage complained of by the plaintiffs was done to the *Daphne* by the stem or bluff of the starboard bow of the *Gusty* which struck the starboard side of the *Daphne* and did her such serious damage that she had to be beached. The collision occurred in Greenwich Reach, on the north side of mid-channel, off Felstead Wharf, on the afternoon of August 16, 1939. The weather was fine and clear, there was no wind and the tide was flood of a force of about 3 knots.

The *Daphne* was proceeding up river and making a speed of some 7 to 8 knots through the water when her master saw on her starboard side the *Daniel M.* in collision with the *Gusty*. The *Gusty* was proceeding up the river with a petrol barge in tow, full of petrol, and the *Daniel M.* was coming out from the south side of the river, and, in trying to head down river, the *Daniel M.* ran into the port side of the *Gusty* in the way of the engine-room, holing her and causing her engine-room to fill with water. The master of the *Daphne* heard shouts for assistance from the *Gusty*, and immediately ran in under the stern of the *Daniel M.*, which at that time was headed about half-athwart from head down river, and went across the bows of the *Gusty* for the sole purpose of trying to save life—I am satisfied about that. The master of the *Daphne* did that simply because he thought, and very properly thought, that those on board the *Gusty* were in danger of losing their lives and that he must go to help them. The

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force of the impact had knocked one of the crew of the *Gusty* into the water, but, fortunately, he was picked up in time by an inspector of the river police in a launch ; another of the crew of the *Gusty* was hanging on to a rope from the bows of the *Daniel M.* ; the two men in the engine-room of the *Gusty* had been called out from the engine-room just before the collision ; and, as the *Daphne* came alongside the *Gusty*, Mr. Purt, the passenger, jumped for his life into the *Daphne*.

Now everything happened very suddenly and very quickly. It is difficult to say with precision exactly what happened, but I accept the evidence of the master of the *Gusty* that he kept his engines going full speed ahead up to the time of the collision with the *Daniel M.* because he thought that, if he stopped and reversed, his tank barge would run up on to his stern, get out of position and make the collision still more serious than it was. He was quite right to do that, and he was quite right also to call the men out of the engine-room. The result was that the engines were running ahead at the time of the collision. The collision brought the *Gusty* up because the blow was just aft on the *Gusty*, and that, I think, explains the fact that the man who fell overboard swam some little distance up-river from the *Gusty* before he was picked up. Then the *Daniel M.* backed out of the wound, and as soon as she had done that the master of the *Gusty* told the stoker on the tug to shut off the steam from the engines. That was done, but the *Gusty*, released from the *Daniel M.*, had some slight headway. She was deep in the water and sinking rapidly. She had some slight headway, and the result was that she struck the *Daphne* and did the damage which is the subject of this claim. It was a very near thing whether the *Gusty* would sink in deep water or would be beached, but the master, who acted extremely well and kept his head, succeeded in getting her on to the beach before she filled.

Those are the essential facts of the case, and I am quite satisfied that the collision between the *Daphne* and the *Gusty* was not due to any negligence on the part of the *Gusty* or of the *Daphne*. The *Daphne* did her best to save life ; the master of the *Gusty* did his best to save his tug and the lives of those

on board and, by an unfortunate accident, the damage was done. This finding excuses the *Gusty* from any liability for this damage, because it is admitted here that the first collision between the *Daniel M.* and the *Gusty* was solely caused by the negligence of the *Daniel M.*; the *Gusty* therefore, not being negligent in respect of either collisions, cannot be held liable for the damage to the *Daphne*.

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As far as the *Daniel M.* is concerned, I cannot see that she was negligent in backing out of the wound in the *Gusty*. The *Gusty* was taking in water all the time and, in order that the *Gusty* should get on to the beach, she had to be released from the *Daniel M.* I cannot see that the *Daniel M.* did anything that was negligent after the first impact, but she was negligent and did cause the first collision.

The interesting question thus arises whether, under those circumstances and under the circumstances which led up to the second collision, she is also liable for the damage to the *Daphne*. The first question is, did she owe any duty to the owners of the *Daphne*? The *Daphne* was proceeding up the river highway in the ordinary way and she had a perfect right to be there, and although it is true that, to quote the words of Greer L.J. in *Haynes v. Harwood* (1), "Negligence in the air will "not do; negligence, in order to give a cause of action, must "be the neglect of some duty owed to the person who makes "the claim," I think that in this case the *Daniel M.* owed a duty to the *Daphne* just as much as she owed a duty to any other ship lawfully navigating the waters of the Thames in her vicinity.

The next question which I have to consider is whether the *Daphne*, in doing what she did, was a volunteer, and took upon herself the risk of sustaining damage while going to the assistance of the *Gusty*, or whether she did what she did do under a duty. Now it was quite clear to the master of the *Daphne*, even if he had not heard the hailing, that the *Gusty* and those on board were in a position of very great danger, and I think that s. 6 of the Maritime Conventions Act, 1911, applies to the tidal waters of the Thames at Greenwich. That section is as

(1) [1935] 1 K. B. 146, 152.

1940 follows : "6. (1.) The master or person in charge of a vessel
 THE GUSTY "shall, so far as he can do so without serious danger to his own
 AND "vessel, her crew and passengers (if any), render assistance to
 THE DANIEL "every person even if such person be a subject of a foreign
 M. "State at war with His Majesty, who is found at sea in danger
 Bucknill J. "of being lost, and, if he fails to do so, he shall be guilty of a
 "misdemeanour. (2.) Compliance by the master or person in
 "charge of a vessel with the provisions of this section shall not
 "affect his right or the right of any other person to salvage."
 The second sub-section seems to indicate that a duty is thrown
 on the master of the vessel to render assistance to every person
 at sea in danger of being lost, because it clearly states that,
 whatever he does on that duty, he is still to be regarded as a
 volunteer so far as salvage is concerned. It is a well known
 principle of law that a salvor has to be a volunteer ; if he has
 a duty to do what he does, he cannot claim salvage. It is
 satisfactory to notice that to-day that section is loyally obeyed
 by His Majesty's subjects at times under very difficult circum-
 stances. The principle of the section seems to bear out the
 words of Cockburn C.J. in *Scaramanga v. Stamp* (1) where
 he says, "To all who have to trust themselves to the sea
 "it is of the utmost importance that the promptings of
 "humanity in this respect should not be checked or interfered
 "with by prudential considerations as to injurious conse-
 "quences." The principle of the law as far as actions of this
 kind on land for the purpose of saving life is concerned is dealt
 with in *Haynes v. Harwood* (2), and both Greer L.J. and
 Maugham L.J. (as he then was) accept the statements by
 Professor Goodhart in the Cambridge Law Journal, set out
 in the report. Professor Goodhart says there : "The
 "American rule is that the doctrine of the assumption of risk
 "does not apply where the plaintiff has, under an exigency
 "caused by the defendant's wrongful misconduct, consciously
 "and deliberately faced a risk, even of death, to rescue another
 "from imminent danger of personal injury or death, whether
 "the person endangered is one to whom he owes a duty of
 "protection, as a member of his family, or is a mere stranger

(1) 5 C. P. D. 295, 304.

(2) [1935] 1 K. B. 146, 156.

"to whom he owes no such special duty." Greer L.J. goes on to say: "In my judgment that passage not only represents "the law of the United States, but I think it also accurately "represents the law of this country." I should add that Professor Goodhart's article deals with the law as derived from the American cases, and Greer L.J. accepts that as being the law of this country.

Now, was there what is called a *novus actus interveniens* in this case? I have dealt with the question as to whether the master of the *Daphne* was a volunteer, and I hold that he was not; he had a duty to perform and was moved by a sense of duty, and, not exercising any choice in the matter, he went to the assistance of these men. In a sense, certain things were done after the first collision. Notably, the *Daniel M.* backed out from the wound, and the *Daphne* approached and got into a position on the starboard bow of the *Gusty*. That is quite true, but those were acts which followed in the natural sequence of events. They were all actions which followed naturally and properly as a result of the first collision and, in my view, there was no *novus actus interveniens* to break the chain of causation.

That being so, I think that the principle laid down in *Haynes v. Harwood* (1) applies to this case, and that the plaintiffs are entitled to judgment against the second defendants with costs and such costs will include the costs of the first defendants.

Solicitors for the plaintiffs: *R. S. Jackson & Bowles.*

Solicitors for the *Gusty*: *Ingledew, Sons & Brown.*

Solicitors for the *Daniel M.*: *J. A. & H. E. Farnfield.*

(1) [1935] 1 K. B. 146.

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Prize Court—Cargo—Contraband—Sale—Enemy destination—Diversion by sellers to British port—Pre-war contract—Payment by buyers before shipment—Bills of lading to order of sellers—Passing of property—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19, sub-s. 2—Costs—Prize Court Rules, 1939; Order XVIII., r. 1.

The Crown sought condemnation as contraband of a cargo of ore shipped at an Egyptian port on an Italian vessel for Stettin, under a contract made between the claimants, a British firm, as sellers and a Czechoslovakian firm, as buyers. The claimants alleged that at the date of seizure the property in the goods remained in them, and that, as the shipment was under a pre-war contract and they themselves on the outbreak of war when the ship was in the course of her voyage, arranged for the diversion of the ship to a British port, the goods were not subject to condemnation.

The Attorney-General, having regard to all the circumstances agreed that the case should be decided upon the basis that the goods should be released to the claimants if the property was held to be in them at the date of the seizure.

The contract was made in December, 1938. The buyers agreed to pay 85 per cent. of the amount of the provisional invoice against shipping documents, and to pay freight at chartered rates immediately on arrival of the steamer.

Clause 8 (a) of the contract was as follows: "If, after loading, any steamer stemmed under this contract is lost, or is, for any reason unable to deliver the cargo or any part thereof, the quantity of ore so undelivered by such steamer shall be written off the contract quantity"

In April, 1939, the buyers exercised their option to receive the goods at Stettin. By that date Czechoslovakia had been incorporated in the German Reich. In June, 1939, at the request of the buyers a provisional invoice was sent for the full price without any deduction in respect of freight. The invoice contained these words "c.i.f. Stettin, ... payments to be made in sterling by cheque on London." In July, departing from the contract terms of payment, the buyers chose to pay the full amount of the invoice 14,889*l.* in advance.

On July 14, 1939, the *Gabbiano* was chartered for the carriage of the goods to Stettin, and she sailed on August 27. In instructing their agents at the port of discharge the claimants stated that they would be paying the freight. The bills of lading, dated the same day, acknowledged shipment of the goods, and after the printed words "to be delivered in like good order and condition at the aforesaid port of" there were inserted in type the words "Stettin for final delivery to" the buyers. The bills of lading were made out for delivery to order or assigns, freight and other conditions as per charterparty.

On the outbreak of war the ship was at Messina and the claimants, who still retained the bills of lading, arranged that she should proceed to an English port on payment of extra freight. At Gibraltar the ship and cargo were seized as prize and sent, with a prize crew on board, to Cardiff :—

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Held, that the inclusion in the bills of lading of the words "for final delivery to" the buyers merely emphasized that the goods were appropriated to the contract but did not affect the question whether they were appropriated unconditionally; that the presence of clause 8 (a) afforded a valid business reason, in the circumstances which had occurred, for taking the bills of lading to the sellers' order; that the inference to be drawn from their so doing was that they intended to reserve the right of disposal and thus retain the property in the goods; and that accordingly the claimants had established their right to the release of the proceeds.

Though Order XVIII. of the Prize Court Rules appears to leave the question of costs to the unfettered discretion of the judge, the discretion must be exercised judicially and the direction of the Privy Council in *The Baron Stjernblad* [1918] A. C. 173, that if there were suspicious circumstances justifying the seizure, the claimant is not entitled to costs, is to be taken as a rule of law guiding the exercise of the discretion.

CAUSE for condemnation of cargo.

The Crown sought the condemnation of a cargo of 9000 tons of manganiferous ore, or the proceeds thereof, shipped at an Egyptian port on the Italian steamship *Gabbiano* for Stettin. The claimants, the Sinai Mining Co., Ltd., a British company, contended that at the date of seizure the property in the goods remained in them, and that as the shipment took place under a pre-war contract the goods, which were absolute contraband under the Order in Council of September 3, 1939, were not subject to condemnation.

The facts are summarized in the headnote and fully set out in the judgment.

The Attorney-General (Sir Donald Somervell K.C.) and Cyril Miller for the Procurator-General.

B. J. M. MacKenna for the claimants.

The arguments sufficiently appear from the judgment. In addition to the cases there cited, counsel for the claimants referred to *Harrison v. Fortlage*. (1)

(1) (1896) 161 U. S. 57.

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1940. May 7. THE PRESIDENT (SIR BOYD MERRIMAN) read the following judgment: In this case the Crown asks for condemnation of a cargo of 9000 tons of manganiferous ore, or the proceeds thereof, shipped from Abu Zenima, a port in the Sinai Peninsula, on an Italian steamship *Gabbiano*, for Stettin, under a contract made between the claimants, as sellers, and the Vitkovice Mines, Steel and Ironworks Corporation, a Czechoslovakian company, as buyers. The claimants, the Sinai Mining Company, Ltd., an English company, contend on the other hand that at the material date, namely, the date of the seizure by the Crown, the property in the goods remained in them, and that as the shipment took place in the ordinary course of business, under a pre-war contract, neither the contract nor the shipment being made in anticipation of war, the goods are not subject to condemnation, notwithstanding their enemy destination: see, for example, *The Miramichi* (1), approved in *The Parchim*. (2) It was pointed out by the Attorney-General, on behalf of the Crown, that that contention could not be accepted without qualification where the goods seized were, as in this case, absolute contraband under the Order in Council; but having regard to all the circumstances of this case and, in particular, to the fact that the claimants themselves arranged for the diversion of this cargo to an English port, he was content that the case should be decided upon the basis that the goods should be released to the claimants if the property was held to be in them at the date of the seizure.

The facts are as follows. The contract for the sale of this ore was made through the sellers' agents, a Dutch firm at Rotterdam, on December 23, 1938; the quantity was to be one steamer cargo of 6000/8500 tons in sellers' option and shipment was to be between July and December, 1939, also in sellers' option. As the subsequent history shows that the buyers were prepared to receive the quantity actually shipped nothing turns on the fact that this exceeded the contract quantity. The quality was described as Sinai manganiferous ore, guaranteed to contain a minimum of 25 per cent. metallic

(1) [1915] P. 71.

(2) [1918] A. C. 157, 160.

manganese in a dry state, and the price was to be 10¼*d.* per unit of manganese and 4*d.* per unit of iron in the ore, dried at 100 degrees centigrade per ton of 1000 kilos, c.i.f. Gdynia, Danzig or Stettin, one port in buyers' option. Moisture was to be deducted from the weight. Clause 6 of the contract provided for weighing and sampling during the discharge of the steamer conjointly by representatives of the buyers and sellers, for the method of arbitration in the event of differences, and for the ascertainment of the quantity of moisture at the same time. It follows that there could be no final ascertainment of the price until the prescribed tests had been made. The buyers agreed to pay 85 per cent. of the amount of the provisional invoice, to be based on certain percentages of content to which I need not refer in detail, in British sterling in London against shipping documents, and to pay freight at chartered rates in nett cash in British sterling to the steamer's agents at the port of discharge immediately on the arrival of the steamer, and to pay the balance of the purchase price in British sterling against presentation of the final invoice to be rendered on ascertainment of the weight and analysis.

Among the general conditions was the following clause, on which great stress was laid by the claimants: "8. (a) If, after "loading, any steamer stemmed under this contract is lost, "or is, for any reason, unable to deliver the cargo or any part "thereof, the quantity of ore so undelivered by such steamer "shall be written off the contract quantity unless otherwise "mutually agreed between buyers and sellers."

By letter of April 11, 1939, the buyers exercised their option to receive the goods at Stettin, and in the same month modifications of the contract whereby the weight to be invoiced was to be the official railway wagon weight, ascertained at the port of discharge, and the sellers were to arrange the insurance of war risks for their own account, were agreed to. By that date Czechoslovakia had been incorporated in the German Reich. One effect of this was that the buyers had to apply for permission to make payment in sterling in accordance with the contract. Accordingly, on June 8, 1939, at the request of

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the buyers, through the Rotterdam agents of the sellers, a provisional invoice was sent for the full price, without any deduction in respect of freight. The invoice contained these words, "c.i.f. Stettin, contract dated December 23, 1938, "payments to be made in nett cash in British sterling by "cheque on London in favour of the Sinai Mining Company "Limited," though on receipt of it, the sellers' agents called attention to the fact that the buyers would only have to pay in due course, 85 per cent. of the provisional value against the documents. In fact on July 11, payment of the full amount of the invoice, 14,889*l.* 8*s.* 8*d.* was made in sterling. The affidavit filed on behalf of the claimants makes it clear that this departure from the contract terms of payment was entirely at the buyers' instance, and that they are unable to give the reason for their making the voluntary payment in advance. By charterparty dated July 14, 1939, the *Gabbiano* was chartered for the carriage of these goods from Abu Zenima to Stettin and sailed on August 27, 1939. In giving instructions to their agents at the port of discharge the claimants announced that they would be paying the freight. The bills of lading, in English form, are dated August 27, 1939. They acknowledged shipment of the goods by the claimants for the voyage from Abu Zenima to Stettin; and after the printed words, "to be "delivered in like good order and condition at the aforesaid "port of " there is inserted in typewriting the words, "Stettin "for final delivery to" the buyers. They are made out for delivery to order or assigns, freight and other conditions for the same as per charterparty dated London, July 14, 1939.

On the outbreak of war on September 3, 1939, as appears from a letter dated December 4, 1939, written on behalf of the claimants to the Procurator-General, the *Gabbiano* was at Messina, bunkering, and her owners informed the claimants that they proposed to discharge the cargo there; but the claimants who still retained the bills of lading protested, and arranged that the ship should proceed with the cargo to the United Kingdom on payment of additional freight. At Gibraltar, on or about September 18, she was seized by H.M.S. *Leda*, and a writ was issued in the Prize Court at

Gibraltar. On September 26, a prize crew was provided by H.M.S. *Cormorant*, and the ship sailed for Cardiff, where she arrived on October 3. Meanwhile, on September 27, the Prize Court at Gibraltar pursuant to s. 1 of the Prize Court Act, 1915, remitted the proceedings to this Court. In fact a fresh writ in this Court was issued on October 9, 1939, as upon the seizure of September 26. I am invited by both parties to ignore the proceedings in the Gibraltar Prize Court. I am also invited to ignore as irrelevant a purported sale of the cargo, afterwards cancelled, to buyers in Cardiff.

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The cargo was, in fact, sold soon after arrival in this country and has already, no doubt, been put to some good use. I am, therefore, only concerned with the disposal of the proceeds, and the sole question now to be determined is whether the property remained in the claimants at the date of seizure.

Before considering the arguments, there are two observations to be made upon the vital documents, the contract and the bills of lading. At the hearing Mr. MacKenna put in, by consent, though it had not been referred to in the claimants' affidavits, a letter of July 27 from the claimants in London to their Sinai office at Abu Zenima containing the following specific instructions with regard to this shipment: "s.s. *Gabbiano*, for your guidance, documents for this cargo should "be made out to order and the originals sent to this office." It is, therefore, impossible to say of these bills of lading, as was said of those in the same form in *The Parchim* (1), that the form was determined by the sellers' agent without knowledge of the contract and, though it may have been determined on general instructions from his principal, without particular instructions given in view of the particular contract. Moreover, although the payment was made more than six weeks before shipment, no request was made by, or on behalf of, the buyers that the bills of lading should be made out to their order. In the claimants' affidavit, already referred to, it is sworn that the bills of lading were taken in this form in order that they might retain the right of property in and possession

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of the goods in themselves until they assigned the bills of lading to the buyers. They were still in their possession at the time of the first seizure, but had been endorsed to the prospective buyers under the abortive contract already mentioned before the ship sailed from Gibraltar.

Also, the original contract exhibited to the affidavits is typewritten throughout. There is no question, therefore, of an inadvertent failure to delete, as inappropriate to the particular contract, a stock clause in a printed form of contract.

The Attorney-General's argument may be summarized as follows. This contract is expressed to be a c.i.f. contract. Under such a contract it is customary to take the bills of lading to sellers' order, but this is only because payment is to be made against tender of the shipping documents and the seller is not prepared to part with the property in the goods until that condition is fulfilled: see *Stein, Forbes & Co. v. County Tailoring Co.* (1) In such cases it is appropriate to invoke the prima facie presumption under s. 19, sub-s. 2, of the Sale of Goods Act, 1893, that the seller reserves the right of disposal, with the result that the property in the goods does not pass notwithstanding that the shipment of the goods for the purpose of transmission to the buyers would otherwise operate as an unconditional appropriation, and the property in the goods would pass under r. 5 of s. 18. In this case, however, payment was made in advance of shipment, not merely of the percentage of the price which the contract provided should be made against shipping documents, but of the full amount of the provisional invoice, not in accordance with the contract, but because of European events supervening after the contract had been made. In these circumstances it would, he argued, be wrong to draw the prima facie inference that the sellers reserved the right of disposal, as there was no business reason why they should do so. Therefore, the property passed to the enemy buyers on shipment. He relied upon *The Parchim* (2) as illustrating the kind of circumstances in which the prima facie inference from taking the bills of lading to sellers' order should be negated.

(1) (1916) 86 L. J. (K. B.) 448.

(2) [1918] A. C. 157, 164, 172.

Now the contract in *The Parchim* (1) differed from that in the present case in many essential respects. It was a contract for the sale of a whole cargo per *Parchim*, which had, to quote Lord Parker's judgment, "far more of the characteristics of a "contract f.o.b. Taltal than it has of a contract c.i.f. European "port." Again, he says: "The contract is for the sale of the "whole cargo of a named ship. On shipment, or at any rate "on notification of shipment, the cargo is at the risk of the "buyer, who has to pay for it whether it arrives or not. The "cargo is to be insured for buyer's account and benefit and "insured at its arrived value, including profit, which the "buyer alone could make. The buyer takes over the charter-party and names the port of discharge. The only matter "which seems to point to an intention not to pass the property "on shipment is the form in which the bills of lading were "taken," and then follows the passage quoted earlier in this judgment, which, as I have already said, does not apply to the facts of this case. It is plain, see p. 168, that their Lordships thought that Sir Samuel Evans had laid too much stress on the form of the bills of lading, and had not given as much effect as he ought to have to the fact that the contract was for the sale of the whole cargo of a named ship, and that the cargo was clearly at the risk of the buyers from a time anterior to the capture. In this case, however, the provision as to risk in clause 8 (a) is the converse of that in *The Parchim*. (1) Not only are the buyers not at risk if, after loading, the ship is lost, or is for any reason unable to deliver the cargo, or any part thereof, but the undelivered ore is written off the contract quantity, meaning, as I understand it, that the contract is cancelled wholly, or pro tanto, as the case may be. Save that it illustrates the proposition that other facts in the case may be such as to rebut the prima facie inference to be drawn from the form of the bills of lading, I do not think that *The Parchim* (1) assists me in the decision of this case. For a like reason I am not much impressed by the argument that a c.i.f. contract is a sale of documents and not a sale of goods, and that as the price had been paid in advance the sellers

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must have taken the shipping documents as agents for the buyers. Except as a way of expressing that a c.i.f. contract is to be performed by the delivery of the shipping documents the phrase has been disapproved: see *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.* (1) per Bankes L.J. and per Warrington L.J.; and see *Malmberg v. H. J. Evans & Co.* (2) per Scrutton L.J. Successive editions of Chalmers' Sale of Goods Act, 1893, including those edited by Sir Mackenzie Chalmers himself, contain the following passage in the notes to s. 32: "It is sometimes said that a c.i.f. contract is a "contract for the sale of documents rather than a sale of goods; "but the cases show that it is a contract for the sale of "insured goods, lost or not lost, to be implemented by the "transfer of proper documents." The contract in this case is certainly not a contract for the sale of goods lost or not lost.

The essentials of a c.i.f. contract proper have been summarized authoritatively in several well known judgments. I am content to refer, without quotation, to the recapitulation of them by Lord Atkinson in *Johnson v. Taylor Brothers & Co., Ltd.* (3) By this test, clause 8 (a) of this contract is inappropriate to a c.i.f. contract proper (compare Scrutton on Charterparties, 14th ed., in the notes to art. 59, at p. 206, and Judge Kennedy's book on c.i.f. contracts, 2nd ed., at p. 5), for the goods are not at the buyers' risk in the events referred to in that clause. Nevertheless the contract may remain, as it is expressed to be, a c.i.f. contract but with variations: see for example *Denbigh Cowan & Co. v. R. Atcherley & Co.* (4), and *Karinjee Jivanjee & Co. v. William F. Malcolm & Co.* (5) For example, if the circumstances provided for in clause 8 (a) never arose, the contract would, in normal conditions, be performed according to its tenor as an ordinary c.i.f. contract. Nor would any practical inconvenience result if the contract had to be resolved in whole or in part by a loss covered by the insurance policy after the buyer had taken up the documents,

(1) [1916] 1 K. B. 495, 510, 514.

(2) (1924) 30 Com. Cas. 107, 112.

(3) [1920] A. C. 144, 155.

(4) (1921) 90 L. J. (K. B.) 836.

(5) (1926) 25 Ll. L. Rep. 28.

or even if he had taken them up after, but in ignorance of, the loss. If, however, a total loss occurred to the knowledge of the parties before tender of the documents, the argument on both sides assumed, as I think correctly, that, contrary to the law applicable to a c.i.f. contract proper (see *Manbre Saccharine Co. v. Corn Products Co.* (1)), the sellers could not call upon the buyers to take up the documents, at any rate if the sellers still retained the bills of lading in their own possession at the material time. Nor would there seem to be any business convenience in their doing so. But it is unnecessary to decide what the legal position would be in this and other hypothetical contingencies. It is sufficient to say that I can see no answer to Mr. MacKenna's argument that the presence of clause 8 (a) in this contract, in the circumstances which have actually occurred, affords a valid business reason for taking the bills of lading to the sellers' order, and that in the circumstances of this case it cannot be said that the only business reason for so doing had disappeared with the payment of the whole price in advance. I do not think that the claimants were guilty of any breach of contract in so doing; but, even if they were, the legal position is not affected: see, for example, *Gabarron v. Kreeft* (2), where there was no question of securing the price and where, as in the present case, the right of disposal was in fact used to withdraw the goods entirely from the contract. Nor does it seem to me that the inclusion in the bills of lading of the words "for final delivery to" the buyers makes any difference. These words seem to me merely to emphasize what would otherwise be implied from the shipment, that the goods were appropriated to the contract, but do not, in my opinion, affect the question whether, within the meaning of s. 18, r. 5, and s. 19, they were appropriated unconditionally. I can see no reason for holding that in taking the bills of lading to their own order the sellers did so as agents for or on behalf of the buyers (see *Mirabita v. Imperial Ottoman Bank* (3) per Cotton L.J.), or for drawing any other inference from their so doing than that they intended to

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(1) [1919] 1 K. B. 198.

(3) (1878) 3 Ex. D. 164, 172.

(2) (1875) L. R. 10 Ex. 274.

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reserve the right of disposal and thus to retain the property in the goods.

For these reasons I hold that the claimants have established their right to the release to them of the proceeds of this cargo.

MacKenna asked for the costs of the proceedings.

Cyril Miller. By Order XVIII., r. 1, of the Prize Court Rules, 1939: "The costs of and incident to all cases shall, except "when otherwise provided by any agreement, or by statute, "be in the discretion of the judge." But it is submitted that that discretion will be exercised according to the manner in which it has been exercised in the past. The Privy Council discussed the question of costs in *The Zamora* (1) where it was held that in proceedings under the new practice in prize, in which the Crown, instead of the actual captors, is a party, damages and costs may be awarded against the Crown or the officer who represents the Crown. But the only case in which it appears that costs were given against the Crown where damages were not also awarded is *The Kronprins Gustaf Adolf* (2), where the claimants were given the costs incurred after a certain date. But in that case the Court was really giving the claimants compensation for the unreasonable delay on the part of the Crown in releasing the goods.

In *The Baron Stjernblad* (3) Lord Parker stated the principle in very clear terms: "If there were no circumstance of "suspicion, or, as it is sometimes put, 'no probable cause' "justifying the seizure, the claimant to whom the goods are "released is entitled to both costs and damages. If, on the "other hand, there were suspicious circumstances justifying the "seizure, the claimant is not entitled to either costs or "damages": see also *The Larchmore*. (4) The present case is certainly one in which the seizure was justified and which called for investigation, and on these grounds it is submitted the Crown should be given the costs.

[THE PRESIDENT referred to *The Bathori* (5) when the

(1) [1916] 2 A. C. 77.

(4) (1919) 1 Ll. L. Rep. 18.

(2) (1917) 2 B. & C. P. C. 418.

(5) (1932) 44 Ll. L. Rep. 48, 55.

(3) [1918] A. C. 173, 175.

Procurator-General was given the general costs of the action and the claimants were allowed to set off the costs on one issue.]

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MacKenna. When the Procurator-General issued his writ he knew that the bills of lading were made out to the order of the claimants, and that the ship was travelling pursuant to their orders to the United Kingdom, and if the cargo was their property, which prima facie it appeared to be, no order of condemnation would be made.

[THE PRESIDENT. This was a cargo of goods declared by the Order in Council to be absolute contraband and consigned to an enemy destination. Also, apart from the arguable point as to whether or not the property remained in the claimants, there was the special point that they had already received payment in full.]

I realize the difficulty in contending that once it is shown there is a reasonable cause for suspicion the exercise of the Court's discretion is fettered, but it is a fair matter for consideration that it is not in the power of any Court to bind this Court in the exercise of its discretion, having regard to the terms of Order XVIII. of the Prize Court Rules.

THE PRESIDENT. Order XVIII., r. 1, of the Prize Court Rules appears to leave the costs in these matters to the unfettered discretion of the judge, but that discretion, like any other exercise of discretion, must be exercised judicially, and I find a very plain direction from the Privy Council in *The Baron Stjernblad* (1), as to the principle of law on which this discretion should be exercised. Lord Parker said: "If, on "the other hand, there were suspicious circumstances justifying "the seizure, the claimant is not entitled to either costs or "damages." It is quite plain from the context that that was intended to be laid down as a rule of law guiding the exercise of discretion.

I am not going to repeat the various circumstances which have been urged in this case, but to my mind it is a very plain case in which the Crown were fully justified in exercising

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their right as captors, and in bringing this matter before the Court for investigation. I think in those circumstances that I ought not to make any order as to costs.

Solicitor for the Procurator-General : *The Treasury Solicitor*.
Solicitors for the claimants : *Allen & Overy*.

E. C. M. T.

SMITH *v.* SMITH OTHERWISE HAND (BY HER GUARDIAN).1940
April 24.

Nullity of marriage—Husband's petition—Respondent alleged to be subject to recurrent fits of insanity at time of marriage ceremony—Meaning of "insanity," "unsoundness of mind," and "fits"—Decree—Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), s. 7, sub-s. 1 (b).

On the first petition brought under s. 7, sub-s. 1 (b), of the Matrimonial Causes Act, 1937, for nullity of marriage on the ground that at the time of the marriage the wife respondent was subject to recurrent fits of insanity, it was held (a) that the words "of unsound mind" and "insanity" had the same meaning in the sub-section, and (b) that where it was shown that the wife was subject to an increase in the acuteness or severity of unsoundness of mind recurring periodically in its course, she was "subject to recurrent fits of insanity" within the meaning of the section.

HUSBAND'S PETITION for nullity of marriage.

The ceremony of marriage took place on October 15, 1938, at St. David's Church, Exeter. On October 15, 1939, Mr. Smith presented a petition for nullity of marriage on the ground that the respondent was at the time of the ceremony of marriage subject to recurrent fits of insanity, in pursuance of s. 7, sub-s. 1 (b), of the Matrimonial Causes Act, 1937. (1) The three conditions laid down by the proviso to the section for the presentation of the petition were satisfied.

By her answer filed by her guardian ad litem, a sister of the respondent, the allegation was denied.

The essential facts are contained in the subjoined excerpts from the judgment.

J. E. N. Russell for the petitioner.

(1) (1 Edw. 8 & 1 Geo. 6, c. 57), s. 7, sub-s. 1 (b), provides that "in addition to any other grounds upon which a marriage is by law void or voidable, a marriage shall be voidable on the ground . . . (b) that either party to the marriage was at the time of the marriage of unsound mind . . . or subject to recurrent fits of insanity or epilepsy."

The proviso to s. 7, sub-s. 1,

lays down three conditions for proceeding under sub-s. 1 (b), namely, that the petitioner was at the time of the marriage ignorant of the facts alleged; that proceedings were instituted within a year from the date of the ceremony; and that marital intercourse with the petitioner's consent had not taken place since the petitioner's discovery of the existence of the grounds for a decree.

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W. B. Frampton and C. B. Hobhouse for the respondent.

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1940. April 24. THE PRESIDENT (SIR BOYD MERRIMAN): This is a husband's petition for a decree of nullity, on the ground that at the time of the marriage the wife was subject to recurrent fits of insanity. Before examining a little more closely the wording of the section under which this petition is presented, it is important to observe first of all that the petitioner cannot succeed unless he is able to satisfy three provisos which are set out in the latter half of s. 7, namely (i.) that at the time of the marriage he was ignorant of the facts on which his petition is based; (ii.) that proceedings were instituted within a year from the date of the marriage, and (iii.) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds on which he is relying.

I have mentioned those provisos first in order to eliminate the necessity for any further consideration. It is conceded, and the evidence is all one way, that the petitioner was ignorant of the facts on which he relies. It is quite plain that proceedings were instituted within a year of the date of marriage; and again the evidence is that there has been no marital intercourse since the discovery of the facts. These provisos, therefore, are satisfied if the petitioner is able to prove the essential fact that his wife was, at the time of the marriage, subject to recurrent fits of insanity.

As this is the first case which has been presented since the Matrimonial Causes Act, 1937, came into force in which reliance has been placed on this ground of nullity, I think perhaps I ought to say a word or two about the reasons for my decision. [His Lordship recited the material part of the wording of the section, and continued:] It is to be observed that unsoundness of mind at the time of the marriage is a ground and that being subject to recurrent fits of insanity or to recurrent fits of epilepsy is also a ground.

At one time in the course of the argument it was suggested, but the suggestion has not been pressed, that the use of the

word "fit" was inapt in connection with insanity, though not in connection with epilepsy, and attention was drawn also to the fact that whereas unsoundness of mind was specified as being a ground, if it exists at the time of the marriage, the word "insanity" is used in connection with the particular ground that I am considering, namely, that of being subject to recurrent fits of insanity.

Quite rightly, however, in my opinion, not only at the Bar, but in the witness box, any attempt to distinguish between the words "unsoundness of mind" on the one hand and "insanity" on the other has been disclaimed. I say quite rightly, because I find that in the Oxford Dictionary, the first meaning of "insanity" is "the condition of being insane; or unsoundness of mind as a consequence of brain disease; madness, lunacy." To take the first of those, "the condition of being insane," I find that "insane" is defined as being, "not of sound mind," "mentally deranged." I do not pretend to know why the one phrase is used in one part of the section, and the other phrase in the other part, but I agree with counsel and the doctors that it is impossible to distinguish between unsoundness of mind and insanity.

Now to consider the phrase, "Subject to recurrent fits of 'insanity,'" I cannot myself see, nor has anybody really seriously suggested or at any rate pressed the suggestion, that there is any difficulty about the use of the word "fits." Again turning to the same authority, the word "fit" is defined, amongst other definitions as "a paroxysm" and as "a sudden and severe, but transitory attack of illness, especially a paroxysm of lunacy." "Paroxysm" is defined as "In pathology, an increase of the acuteness or severity of a disease usually recurring periodically in its course." Speaking for myself, for the purposes of this case I find no difficulty in a paraphrase of the section which would read that the wife was subject to an increase of the acuteness or severity of unsoundness of mind recurring periodically in its course; it seems to me exactly to express the facts of this case.

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This wife is at present confined, and has been confined since July last, in The Old Manor, Salisbury, a private mental hospital. She is there detained in accordance with the procedure laid down under the various Lunacy Acts, and she is detained there because she is of unsound mind. I am not overlooking the fact that Dr. J. J. Martin, who was called to examine her on March 11, told me that on that day, taken by itself, isolated from previous history, he would not have been satisfied to certify her. But equally he told me that taking the whole history into account, it was perfectly obvious that she has suffered from unsoundness of mind, and that that unsoundness of mind has broken out on at least two occasions, namely, once at the time in 1932 when she was in the Maudsley Hospital and, secondly, before and after her admission to The Old Manor at Salisbury.

Indeed Dr. Martin himself said, taking not only his own examination—which I am satisfied from the evidence of the other Dr. Martin, who is in charge of the home, happened to be when she was at her best, during one of the recurring periods of forty-eight to sixty hours when she was calmer and more collected and more lucid than usual—taking his own examination and the history together, Dr. J. J. Martin's diagnosis was that she was subject to recurrent attacks of confusional insanity associated with excitement and with transient hallucinations. I am not prepared to accept, however, that the history of this poor lady's unsoundness of mind is limited to these two outbreaks of which Dr. J. J. Martin was speaking. I am satisfied on the evidence that there was a great deal more; because there is a complete record of her history during her confinement in the Maudsley Hospital. When I use the word "confinement," let it be understood that she was there as a voluntary patient. She was in fact withdrawn from there on the responsibility of her sister, who has given evidence before me, and against the will of the authorities of the hospital. [Having reviewed other facts concerning the respondent's mental condition from time to time after the date of the marriage his Lordship went on:]

In those circumstances I have to decide whether on the

date when this marriage ceremony took place the wife was subject to recurrent fits of insanity. I can only say that it seems to me to be impossible, on the evidence, to hold otherwise. There was unsoundness of mind, I dare say in slight degree, the whole time. There was unsoundness of mind quite plainly in 1932, in December, 1938, and in July, 1939, with intervals of quiescence in between. I have no doubt whatever that on the date when she went through the ceremony of marriage she was subject to recurrent fits of insanity. I understand by that, that though she was not at the time suffering from a fit of insanity in the sense in which that term is used according to the dictionary, yet she was subject to recurrence of such a fit, as indeed occurred twice within the first year of the marriage. In my opinion the husband has proved his case beyond the slightest shadow of doubt and is entitled to a decree of nullity.

The petitioner was ordered to pay the costs of the guardian ad litem.

Solicitors : *Parker, Garrett & Co., for Michelmores, Exeter ; Braikenridge & Edwards, for Veale & Co., Bristol.*

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ANDREWS *v.* ANDREWS (KING'S PROCTOR SHOWING CAUSE).

Divorce—Husband's petition—Petitioner living in adultery—Exercise of the Court's discretion—Requirement to separate from partner in illicit union—Not a universal rule—Principles applicable—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 178, sub-s. 1, proviso—Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), s. 4.

The practice by which a petitioner for divorce who has been living in adultery has been expected to separate from his or her partner in the illicit union pending the suit is not a rule of universal application, and there may be circumstances such as poverty or the interests of children born of such a union which may render it unwise to advise that the association be completely broken off until decree absolute.

HUSBAND'S UNDEFENDED PETITION for divorce.

The marriage took place on August 29, 1925, at the St. Pancras register office, London. The wife left the husband in May, 1930, and he heard no more of her. He entered into an adulterous association with a woman in 1936, and she has had two children by him. In 1938 he was admitted as a poor person to sue for divorce, and his petition was filed on the ground of desertion on May 30, 1938. It was undefended, and on the advice of his solicitors he parted from the woman with whom he was living and their child in March, 1938. The petition did not come to trial until April 4, 1939, and meanwhile, on the entreaties of the woman, he had resumed cohabitation with her. He did not disclose the fact of this resumption of cohabitation at the hearing. A decree nisi was pronounced.

In August, 1939, the King's Proctor filed a plea to show cause why the decree should not be made absolute by reason of the suppression of this fact, and presenting a false case thereby and also giving a false address, whereas he was living as man and wife with the woman in question at another address. By his answer the petitioner admitted that he had committed adultery with the woman between November, 1938, and August, 1939, and prayed for the exercise of the discretion withwithstanding.

By the proviso to s. 178, sub-s. 1, of the Judicature (Consolidation) Act, 1925, as substituted by s. 4 of the Matrimonial Causes Act, 1937, the Court is not bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery.

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S. H. Noakes for the King's Proctor.

C. A. Marshall-Reynolds (for *A. D. A. Balfour*, on war service) for the petitioner.

1940. May 1. THE PRESIDENT (SIR BOYD MERRIMAN) in the course of his judgment said: I do not wish to say anything which would discourage petitioners from breaking an adulterous association and coming before the Court with clean hands; and in many cases that may be the right and proper thing to do. It may well be held to be a test whether the discretion should be exercised. But that cannot be a rule of universal application; and as I said in the course of the argument, I doubt the wisdom of advising, as it were, by rule of thumb, that an adulterous association must always be broken off before a petition can be presented.

Over and over again I have had cases where discretion has been asked for, where there has been a long association, the birth of children, and where in every respect except the actual legal relationship a new home has been set up and is likely to continue indefinitely. In those circumstances, particularly when the people concerned are poor and there are no real means of setting up alternative accommodation, there may be something unreal in insisting on the association being completely broken off with a view, nevertheless, to its being resumed the moment the decree has been made absolute. In other words, it must depend upon the circumstances of the case whether in the first instance any advice of that sort should be given, and, of course, ultimately, whether the discretion of the Court should be exercised notwithstanding that there has been no nominal change in the situation.

This case I regard as one of the class in which the temporary

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interruption of the association made no real difference. These parties had been living together as man and wife. They had had a child already. Another was on the way ; and their one desire was to get married to each other as soon as possible. I cannot imagine that if those facts had all been put before the learned judge he would have hesitated for a moment to exercise his discretion any more than he did on the facts that were actually put before him.

The question is, what should I do now? I am bound to regard as most reprehensible the conduct of this petitioner in deliberately deceiving the Court ; and public policy demands that that sort of deception should be discouraged in every possible way. But again, whether the offence should be visited by rescinding the decree and dismissing the petition, must depend on the circumstances of the individual case.

After considering this matter very carefully I have come to the conclusion that in this case the element of public policy, notwithstanding the deception which has been practised, is in favour of allowing the decree to stand. I think it would be a misfortune if the prospect of this association turning into a happy married home were to be frustrated. All the evidence is one way about the devotion of these two people to each other and their desire to make an honest home together. And I have to consider also the interests of the two small children who have already been born.

I think, therefore, that in this case I should be doing wrong if I were to set aside the decree nisi, and I do not propose to do so. But the King's Proctor's intervention has succeeded, and of course must be allowed.

His Lordship directed that the petitioner should pay the King's Proctor's taxed costs up to a maximum of 25*l.*, and, on the petitioner's application, that the decree be made absolute on the following Monday.

Solicitors : *The King's Proctor ; Withers & Co.*

W. L.

HORTON v. HORTON.

1940
June 19.

Divorce—Husband's petition for dissolution of marriage—Wife's cruelty—Husband's health injured by her wilful and unjustifiable conduct—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 176 (c)—Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), s. 2.

In order to obtain relief under the Matrimonial Causes Acts on the ground of cruelty it is not enough for a husband to establish that his wife's character has developed in such a way as to make it impossible for him to live happily with her. He must prove that she has committed wilful and unjustifiable acts inflicting pain and misery upon him and causing him injury to health.

Where a husband petitioned for divorce on the ground of cruelty, it was held that his health was injured not merely by the development and manifestation of the wife's character acting in its own sphere, but by her wilful and unjustifiable conduct to him which was an intrusion upon and did violence to his own mode of living. That course of conduct amounted to legal cruelty.

HUSBAND'S PETITION for dissolution of marriage.

In this petition for divorce, dated July 8, 1939, the husband alleged in pursuance of s. 176 (c) of the Supreme Court of Judicature (Consolidation) Act, 1925, that the wife had been guilty of cruelty, by reason of which he suffered in health. He prayed for the exercise of the Court's discretion notwithstanding his own adultery. The wife denied the charges.

The parties were married at St. Giles's Church, Northampton, in November, 1902. The petitioner is now about sixty-four years of age, and the respondent three or four years younger. After a separation in January, 1935, they entered into a deed of separation in October, 1937. The rest of the relevant facts are contained in the judgment.

D. N. Pritt K.C. and *R. Ritson* for the petitioner.

H. W. Barnard K.C. and *G. C. Tyndale* for the respondent.

Cur. adv. vult.

1940. June 19. BUCKNILL J. delivered a written judgment as follows :—

This is a petition by William Henry Horton for the

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dissolution of his marriage to Florence, his wife, on the ground of her cruelty. The wife has denied that she has been guilty of cruelty to her husband, and the Court has to decide whether the husband has proved his case.

The marriage took place in 1902, the husband being then twenty-seven, and the wife, according to the marriage certificate, twenty-three, so that each is now over sixty years of age. A son, Stratford, was born in 1905 and another son, Frank, in 1910. The conflict between the parents has extended to the children; the elder son was a witness for his father and the younger son a witness for his mother.

The husband is a manufacturer with a business in Northampton and he and his wife lived there throughout their married life. In January, 1934, the wife went away for a month from the matrimonial home on the advice of the family doctor because husband and wife were getting on each other's nerves. In January, 1935, the husband left his wife and the matrimonial home, asserting that it was impossible for him to live with his wife. He remained apart from his wife, and in October, 1937, a deed of separation was signed under which he agreed to allow her 400*l.* a year. In July, 1939, the husband filed this petition, eighteen months after the Act giving a right to divorce in cases of cruelty had been enacted.

In the meantime the husband had formed an association with another woman whom he now wishes to marry. He has in fact committed adultery with her, the first time being in September, 1936, after he had been living alone and apart from his wife for more than eighteen months. It is fair to the husband to say that he did not meet the woman in question until nearly a year after he had left his wife, so that his departure from his wife was not connected in any way with the other woman. The relations between the petitioner and this woman are only material so far as the issue of cruelty is concerned, because they provide an incentive to the husband to exaggerate the acts of his wife towards him which he says were acts of cruelty. This makes it all the more necessary to examine the evidence of the husband carefully and to discount a certain amount of it.

There is no doubt that the husband left the wife on January 2, 1935, when he wrote this letter to her: "My dear Flo, I am truly sorry that you have made it impossible for me to live with you any longer, so do not expect me to return. I am willing to make reasonable provision for you and have instructed Mr. Chamberlain in the matter. If you will see him, he will explain what I propose to do. You have repeatedly told me that you desire a separation. What plans you may have I do not know, but in any case I hope you will find happiness. With regret, Harry."

Her reply on the following day was as follows: "My dear Hal, Your letter has dealt me a cruel blow. I have never had any desire for a separation, so let that be quite plain. I have no plans as you know full well. All I have ever asked is, for that love and confidence you have so long withheld. I cannot see Mr. Chamberlain at present. If there is any hurry perhaps you will ask him to communicate with me. Yours always, Flo."

Why was it impossible for Mr. Horton to live with his wife? In my judgment it was impossible because the conduct of his wife towards him had made him ill. Dr. Dunbar, who was called as a witness, and was a very fair and impartial witness, said that at the time Mr. Horton was suffering from neurasthenia, which was manifested by twitching and sleeplessness. After the husband had lived away from his wife for some time his health improved considerably. I am satisfied that this neurasthenic condition was due to the miserable existence which the husband lived in his home through his wife's behaviour to him.

Was the wife then guilty of legal cruelty? Her conduct had caused injury to health, not serious in itself, but injury which would have got more serious if he had remained in the matrimonial home. The question which I have to decide is whether that conduct amounted to cruelty.

In my view the most serious series of charges of cruelty made by the husband against the wife are the allegations that she from time to time out of jealous spite damaged various things belonging to him, and in particular his masonic clothing,

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several of his hats, a presentation gold cigarette case, a presentation silver salver, and the lens of one of his spectacles which she deliberately scratched, probably with a diamond. These are serious charges. If made out they show a malevolence which is likely to bear fruit in acts of cruelty—an evil, unwifely spirit—far more serious to my mind than mere nagging and possessiveness and jealousy. Are these charges or any of them established? It is quite true that it is a case of oath against oath, but I preferred the husband as a witness to the wife.

The most serious charge relates to the scratching of one of the lenses of his spectacles. The husband is a short-sighted man who always has to wear spectacles. His evidence was that in May, 1934, he promised to take his wife and younger son in his car to Cambridge where he was to attend a masonic gathering. Being of an hospitable nature, and in this respect different to his wife, who, I think, much preferred to live in the strict seclusion of her own immediate family, on the day before the trip he invited a brother mason to occupy the spare seat in the car. This, he said, infuriated his wife, who complained that he had spoilt her enjoyment. On the following morning when he got up he left his spectacles in the bedroom while he went to his bath—on his return he found one of the lenses badly scratched. The lens was produced in Court. His wife denied any knowledge of the damage and suggested that the damage was done by an emeryboard for finger nails which Mr. Horton carried in his pocket.

Mr. Horton asserted that he taxed his wife with doing the damage and actually deducted the cost of a new lens, 24s., from her housekeeping allowance. The only reasonable alternative to the wife doing the damage seems to me to be that the husband has deliberately concocted the story for the purpose of obtaining a divorce. I do not think that the husband has invented the charge of damage and I accept his evidence on this point, and I am driven to the conclusion that his wife deliberately did the damage, and has lied about it in the witness box.

As regards the damage to other articles of which the husband

complains the evidence is not so strong and I come to no definite conclusion about the cigarette case and the salver. I find that she did the damage to his masonic regalia, and to his panama hat.

The acts of physical violence of which the husband complains related to: (1.) Occasions when he asserts that his wife has snatched the spectacles off his nose, and they have been broken in consequence. (2.) The occasion when he finally left the house in January, 1935. (3.) An assault at his office in August, 1936. I accept his evidence on these charges. I think the kick on the leg by the wife when he left has been exaggerated by the husband because it is not mentioned in his letter, in which he sums up his complaints against his wife. The younger son who was called as a witness and was in the dining room when his father left did not hear any scuffle or struggle in the hall, but admittedly there was some kind of a struggle. I thought the elder son's evidence was rather more convincing than the evidence of the younger son, but each was in a difficult and painful position when giving evidence.

The third charge made by the husband against the wife is the charge of perpetual nagging, accusations against him of associating with other women, complaints about his absence from home on masonic business, charges of hypocrisy about his religion and so on. This course of conduct was carried on at night. The husband said that his wife refused to allow him to sleep in a separate room or in a separate bed, and when he was tired out and tried to go to sleep, she would dig him in the back with her elbow and prevent him sleeping, even slap him at times on the face for the same purpose.

Broadly, I accept the evidence of the husband on these points. I do so not only because I thought his evidence seemed to be true, but also because the evidence of Dr. Dunbar seemed to support his case. I was particularly impressed by the statement of Dr. Dunbar that he was called to see Mrs. Horton about a year before her husband left her. He found her in a very hysterical state. She suggested to Dr. Dunbar that her husband had been trying to poison her. Dr. Dunbar said he found absolutely no evidence for this charge, which

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appeared to him to be a most extraordinary statement for her to make. Mrs. Horton denied ever having made any such statement. She is a woman who, I think, may say and do things which she very soon forgets, but I am satisfied that she did make this statement to Dr. Dunbar.

I think that the evidence all points to the fact that Mr. Horton was fond of his home, fond of his children, fond of his dog, and wanted to be fond of his wife. He was a public-spirited citizen of Northampton, a man who would greatly resent the gossip which his leaving his wife and home must spread. I am satisfied that he was a good husband and father, and was driven from his home by his wife's conduct towards him.

Do these facts which I have found to be true establish the charge of cruelty? Sect. 2 of the Matrimonial Causes Act, 1937, enacts that a petition may be presented to the High Court either by the husband or by the wife on the ground that the respondent has since the celebration of the marriage treated the petitioner with cruelty.

The Act does not define cruelty, but without doubt the Legislature intended the word to have the meaning assigned to it by the Courts in many earlier matrimonial cases in which judges have considered the question whether one spouse has been cruel to the other. I take as my guide in this matter the speech of Lord Herschell in *Russell v. Russell* (1), in the course of which he made the following remarks:—

“It . . . is, indeed, beyond controversy, that it was not “every act of cruelty, in the ordinary and popular sense of that “word, which amounted to *sævitia*, entitling the party aggrieved “to a divorce; that there might be many wilful and unjustifiable acts, inflicting pain and misery, in respect of which that “relief could not be obtained”

“. . . Upon a review of the authorities prior to the time “when the Divorce Act came into operation, I think it may “confidently be asserted that in not a single case was a divorce “on the ground of cruelty granted unless there had been “bodily hurt or injury to health or a reasonable apprehension

(1) [1897] A. C. 395, 445, 456, 457.

"of one or other of these But the principle or rule
 "that a judicial separation can only be granted on the ground
 "of cruelty where there has been injury to body or health, or the
 "reasonable apprehension of it, has been frequently recognised
 "and acted upon since 1858. The law has never been
 "enunciated in other terms, and no other test has been
 "suggested as the correct one. . . ."

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When *Russell v. Russell* (1) was decided, the remedy for cruelty was a legal separation. It cannot be supposed that a wider or more liberal meaning should be attached to the word cruelty, now that it is a ground for divorce. The question for me, therefore, is whether I am satisfied on the evidence that the wife has committed wilful and unjustifiable acts, inflicting pain and misery upon her husband, which have caused him bodily hurt or injury to his health, or have caused him reasonable apprehension of such hurt or injury.

Mere conduct which causes injury to health is not enough. A man takes the woman for his wife for better, for worse. If he marries a wife whose character develops in such a way as to make it impossible for him to live happily with her, I do not think he establishes cruelty merely because he finds life with her is impossible. He must prove that she has committed wilful and unjustifiable acts inflicting pain and misery upon him and causing him injury to health. In this case, the husband's health was not injured merely by the development and manifestation of the wife's character acting so to speak in its own sphere. It was injured by her wilful and unjustifiable conduct to him which was an intrusion upon and did violence to his own mode of living. This course of conduct injured his health, and in my view amounted to legal cruelty. I find therefore that the petitioner has proved his case.

His Lordship pronounced a decree nisi of divorce in the exercise of his discretion, and directed that the petitioner should pay half the wife's taxed costs.

Solicitors : *Crosse & Sons ; S. Price & Sons, for Darnell & Price, Northampton.*

(1) [1897] A. C. 395. . . . W. L.

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July 3.

MURRAY v. MURRAY (BY HER GUARDIAN).

Divorce—Husband's petition—Wife's insanity—Care and treatment—Irregular detention in "workhouse" institution without order—Five years' period broken—Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), ss. 2 (d), 3—Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 25.

Where a wife, incurably of unsound mind, was in 1935 discharged, relieved, but not recovered, from a mental hospital under s. 25 of the Lunacy Act, 1890, for the purpose of her being detained at an institution technically a "workhouse" within the meaning of that Act, the further statutory requirement under the same section that the medical superintendent of the latter institution should issue a certificate to a certain effect was not complied with.

In 1939 the husband petitioned for the dissolution of his marriage on the ground that the wife was incurably of unsound mind and had been under care and treatment for at least five years continuously immediately preceding the presentation of the petition within the meaning of ss. 2 (d) and 3 of the Matrimonial Causes Act, 1937, having been under detention continuously in the two institutions since 1923:—

Held, (1.) that inasmuch as the original reception order had been discharged the detention of the respondent in the "workhouse" institution was not detention under an order as prescribed by s. 3 of the Matrimonial Causes Act, 1937; and (2.) alternatively, the detention in the "workhouse" institution was not justified owing to the lack of any certificate by the medical officer of that institution. Therefore the petition failed.

Hall v. Hall [1940] P. 46 considered.

HUSBAND'S PETITION for dissolution of marriage.

The petitioner alleged in pursuance of s. 2 (d) and s. 3 (1) of the Matrimonial Causes Act, 1937, that his wife was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

(1) 1 Edw. 8 & 1 Geo. 6, c. 57, s. 2 (d) provides that a petition for divorce may be presented on the ground that the respondent "is incurably of unsound mind and "has been continuously under care "and treatment for a period of at "least five years immediately "preceding the presentation of the

"petition." Sect. 3 provides that such a person of unsound mind "shall be deemed to be under "care and treatment while he is "detained in pursuance of any "order or inquisition under the "Lunacy and Mental Treatment "Acts, 1890 to 1930 . . . and "not otherwise."

Through her guardian ad litem, the Official Solicitor, the respondent denied the allegation.

On August 15, 1923, the respondent was detained in the Bexley Mental Hospital, under a reception order. She was incurably of unsound mind. On June 19, 1935, she was discharged, relieved, but not recovered, to the Leavesden Institution, Abbot's Langley, Hertfordshire, which is technically a "workhouse" within the meaning of the Lunacy Act, 1890. The discharge was carried out regularly under s. 25 of that Act by a certificate to the effect that in the opinion of the medical superintendent the respondent was a proper person to be kept in a workhouse as a patient of unsound mind. The requirement of the same section that the medical officer of the institution into which the patient is received must give a certificate in writing as to matters specified in the same section was not complied with by the Leavesden Institution, owing to a misapprehension.

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F. E. Sugden for the petitioner.

A. Lombé Taylor for the guardian ad litem.

1940. July 3. THE PRESIDENT (SIR BOYD MERRIMAN) delivered judgment as follows: This is a petition by a husband for divorce on the ground of his wife's incurable insanity. As regards the insanity and the incurability there is absolutely no doubt whatever. I need not recapitulate the medical evidence, but it was conclusive on these points. But the petitioner is not entitled to succeed unless he can prove that, in addition to the respondent being incurably of unsound mind, she has also been under care and treatment for a period of five years immediately preceding the presentation of the petition, and, for the purposes of the section, a person of unsound mind shall, by s. 3 of the Matrimonial Causes Act, 1937, be deemed to be under care and treatment while he is detained in pursuance of any order under the Lunacy and Mental Treatment Acts, 1890 to 1930, and certain other Acts to which it is unnecessary to refer, "and not otherwise."

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This case raises precisely the same point, and in respect of precisely the same Institution, as was dealt with in the case of *Hall v. Hall* (1), which I decided; but as in that case both counsel were agreed that the statute had not been complied with, and it was possible for the case to be dealt with under another part of the Act, and as in this case no such alternative is possible and the whole question has been re-opened, I think it is desirable that I should express my reasons, in the light of my present knowledge, for adhering to the decision which I then gave.

The facts in this case shortly are as follows: On August 15, 1923, the wife respondent was detained in the Bexley Mental Hospital under a reception order of that date. I have already said that the medical evidence about her mental condition is overwhelming. At the material time she had become a case of secondary dementia, and there was absolutely no prospect whatever of her recovering. In these circumstances, on June 19, 1935, she was discharged, relieved, but not recovered, from Bexley Mental Hospital to the Institution at Leavesden, which is not a mental hospital, but is technically a "workhouse" within the meaning of the Lunacy Act, 1890. The discharge was made by virtue of s. 25 of that Act (2), and, so far as the Bexley end of the matter is concerned, was carried out regularly by a certificate that the wife, being a patient discharged from that mental hospital, had not recovered, and that the Medical Superintendent was of opinion that she was a proper person to be kept in a workhouse as

(1) Ante, p. 56.

(2) 53 & 54 Vict. c. 5, s. 25, reads as follows: "Where a pauper lunatic is discharged from an institution for lunatics, and the medical officer of the institution is of opinion that the lunatic has not recovered and is a proper person to be kept in a workhouse as a lunatic, the medical officer shall certify such opinion, and the lunatic may thereupon be received and detained against his will in a

"workhouse without further order if the medical officer of the workhouse certifies in writing that the accommodation in the workhouse is sufficient for the lunatic's proper care and treatment, separate from the inmates of the workhouse not lunatics, or that the lunatic's condition is such that it is not necessary for the convenience of the lunatic, or of the other inmates, that he should be kept separate."

a patient of unsound mind. Notice of that certificate and of the discharge was given to the Board of Control accordingly.

[His Lordship recited the section and continued:] It is unnecessary to say any more about the certificate to be given by the Medical Officer of the Institution, namely, the Bexley Mental Hospital. That certificate was given, and would have been effective to authorize reception and detention against her will in the workhouse, provided that one or other of the conditions specified in the latter part of the section had been complied with; but it is admitted that not until recently, at any rate, and only after this petition had been presented, and in consequence of my judgment in *Hall v. Hall* (1), has any certificate been given by the Medical Officer of the workhouse.

I have had the advantage, which I had not in the former case, of a very full explanation by Mr. Curtis, who is the chief officer of the Metropolitan Asylums Board, of the circumstances relating to this institution. It appears that when the Metropolitan Asylums Board was constituted under the Metropolitan Poor Act of 1867, the larger part of what is now the Leavesden Institution was opened in 1870 for the reception of chronic, harmless mental cases, and I understand that the accommodation was for about 2000 patients. On the other side of the road was a school, which at that time belonged to the St. Pancras Guardians. When, in course of time, the London County Council took over the functions of all the guardians in the metropolitan area, this school was brought to an end, and in or about the year 1929 the school buildings were incorporated with the Leavesden Institution as an "annexe," and thenceforth have been administered as one unit.

As a matter of practical convenience, at the time of the wife's reception, and until the outbreak of the war, after this petition had been presented, I am told that persons like herself who had been discharged from mental institutions under s. 25, and lunatics found in workhouses and detained

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under s. 24, were housed in the smaller building, which used to be the school, and mental defectives and persons in that category were housed in the larger buildings, the older part of the institution. But Mr. Curtis made it very plain to me that at no time was that more than a matter of practical convenience; the whole was in fact administered as one unit under one medical superintendent, and I merely mention the following fact in passing because I think it has a practical significance, though it does not affect the consideration of this particular case. After the outbreak of war the smaller building was required for other purposes, and as a result the patients of all categories have, in fact, been assembled in the larger part of the institution which was the original workhouse, without distinction of the particular category within which they happened to come. I am not overlooking the evidence given by the medical superintendent about the separate facilities for worship, recreation and the like, afforded in the smaller section of the institution; but he did not tell me, as Mr. Curtis has told me, that in addition to the lunatics detained under s. 25, whom the medical superintendent said were the only inhabitants of the smaller section, there were also included the lunatics detained under s. 24 of the Lunacy Act.

I shall return in one moment to the question of the absence of any certificate by the medical superintendent of this institution under the latter half of s. 25, which was the point with which I dealt in *Hall v. Hall* (1); but, first of all, the discussion in this case has led me to think that I may have been wrong in deciding *Hall v. Hall* (1) on the absence of any such certificate, because, before one gets to that point, I am unable, on further consideration, to find, even if all the statutory requirements of s. 25 were complied with in every particular, that the patient is detained under any "Order" under the Lunacy Acts. The section assumes discharge from the institution in which the patient is detained under a reception order, and the section affords authority for further detention against his will in a workhouse without

further order, provided that the requirements of the section are complied with.

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I have looked again at the sections dealing with the discharge of a patient. It is quite true that, so far as I can see, nowhere in the Act is there mention of the discharge of a reception order. When "discharge" is used in connection with the patient, that means discharge from detention under a reception order. If a reception order is in force it expires from time to time under s. 38, as amended by s. 7 of the Lunacy Act, 1891, unless the prescribed continuation procedure is carried out. Nothing of that sort is required in this case. The patient is liable to be detained against his will without any further order, and I am bound to say that I do not see how it is possible to say that the original reception order, as such, survives the discharge of the patient from the institution in which he was detained under that order.

In my opinion from the moment that s. 25 comes into play, the authority for the detention is to be found in the section itself, and is not based upon any order, but is based upon a compliance with the conditions laid down in that section. It may sound technical, but, as I said in the case of *Hall v. Hall* (1), that is not a consideration to which I can give any weight. The definition by which I am bound—the definition of "care and treatment"—is arbitrary, it may be said, and gives rise to anomalies. I referred to some of these anomalies in the case of *Shipman v. Shipman* (2), but I am concerned simply to see that the case is brought within the statutory requirements, not the less so because I am dealing with a party who is under a legal disability.

In this respect a comparison between s. 24 and s. 25 is important. Lunatics were received into this "workhouse," as I will call it within the wording of the Lunacy Act, and into this particular part of the workhouse in which this lady was confined, indiscriminately under ss. 24 and 25, as Mr. Curtis has told me. Under s. 24, a person who is in a workhouse and is found to be a lunatic, can be detained in the workhouse for fourteen days, provided, amongst other

(1) Ante, p. 56.

(2) [1939] P. 147.

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things, that a certificate of the same kind as is referred to in s. 25 is given; but he may not be detained beyond fourteen days without an order of a justice having been obtained under sub-s. 3 of that section—in other words, in such a case the detention after the expiration of the fourteen days depends upon the order of the justice. Sect. 25 deals with a separate subject-matter, the discharge of people who are under reception orders in mental hospitals into “workhouses,” and in respect of them the section expressly says that after their discharge, provided the certificates referred to are given, no further order is necessary.

I think that I ought to have decided the case of *Hall v. Hall* (1), and ought to decide this case, on the ground that this class of detention after discharge from the mental institution ceases to be detention under an order, though it is unquestionably detention under the Lunacy Acts. But, assuming that I am wrong in that respect, I come back to the point which I decided in *Hall v. Hall*. (1) Here again, in my opinion, the contrast between ss. 24 and 25 is of importance. Mr. Curtis called my attention to the fact that with regard to the corresponding certificate required under para. (c) of sub-s. 1 of s. 24, the necessity for giving this certificate in cases such as that of the Leavesden Institution was done away with in the succeeding year by s. 4, sub-s. 2, of the Lunacy Act, 1891; but it is very important to notice that the necessity for giving a certificate of that class is only done away with in connection with s. 24, and is not done away with in respect of s. 25. Mr. Curtis suggested that that might have been a draftsman's error. I do not think so. I think there is a real, practical distinction between the two sections, which explains why the provision was made in the one case and not in the other, and I think it lies in the fact that the class of people dealt with in s. 24 are inmates of an ordinary workhouse who are discovered to be lunatics. If they are inmates of what is technically a workhouse, but is already one of the institutions contemplated for the reception of lunatics—in

other words, if the inmates are all in the same category—it may safely be assumed that no certificate of that sort is necessary, though a certificate of that sort might be required, and, indeed, would be required, if the case were not covered by the special provisions of the amending section.

On the other hand, as I have already said, s. 25 deals with people who, *ex hypothesi*, are admitted to be lunatics, and in this particular case not merely are not recovered, but are hopelessly irrecoverable, and yet are discharged from an institution which is provided for lunatics, to a workhouse. I quite agree there is something to be said for the point of view that if the “workhouse” is one specially set apart for persons of that sort one might have expected the Legislature to forego the certificate in that particular case; but, as I have already indicated, it is not possible to say here, at any time with which I am concerned, that nobody but “lunatics” of this category was confined in this institution. Admittedly there were persons who were being dealt with under the Mental Deficiency Act who, except so far as they may be within the category of “idiots” within that Act, do not come within the definition of lunatics under the Lunacy Acts. That being so, I well understand that Parliament would require that in any given case of such an institution, and with regard to each particular admission into such institution, the medical officer should be prepared to certify either that there was accommodation for the lunatic’s proper care and treatment separate from inmates who are not lunatics, or, alternatively, that the lunatic’s condition was such that it was not necessary for the convenience of the lunatic, or of the other inmates, that he should be kept separate.

At any rate, it is plain to me now, after the very full and helpful exposition of this matter which I have received from Mr. Curtis, that a certificate under s. 25 by the medical officer of the workhouse is a condition precedent to the lawful detention of a lunatic in such an institution, and assuming therefore that this is detention under an order within the meaning of s. 3 of the Matrimonial Causes Act,

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1937, at all, I am bound, in my opinion, to hold that the detention has not been justified by any authority under the Lunacy Act, for lack of any certificate by the medical officer of the workhouse.

Although I am bound to arrive at that conclusion, I should like to say that Mr. Curtis has satisfied me that this was an inadvertence, and I think he has shown me what are the historical reasons why this state of things has been brought about. At the time when the Lunacy Act was passed, none of the categories of "mental defectives" save idiots existed. There were then on the one hand "lunatics" and on the other hand "idiots," and for the purposes of the definition in the Lunacy Act, though the Idiots Act, 1886, and the Lunacy Act, 1890, each excluded their own particular type of patient from the purview of the other Act, nevertheless under the Act of 1890 "lunatic" was defined as meaning "an idiot or person of unsound mind."

In other words, if at the time when this institution was founded under the old Metropolitan Asylums Board both lunatics and idiots were in fact mixed together in the building, they were both "lunatics" within the definition of the Lunacy Act. And what has really happened—indeed, I think it is what Mr. Curtis wished me to understand—is that it has not been realized after the creation of the other categories of mental defectives, in which neither unsoundness of mind nor "lunacy" within the Lunacy Act is necessarily involved, that a mixture of inmates might happen at Leavesden, which would necessitate the giving of this certificate.

But though I see perfectly well that that is the practical explanation, I come back again to the section; and I am bound to say that I think that the certificate is required under the section, even though there may be no inmates at any given moment who are not within the category of "lunatics." In other words, I think that it was always necessary, and still is necessary, that one or other of the certificates should be given by the medical officer of the workhouse before a lunatic can be detained there without further order against his will.

For those reasons I am bound to dismiss this petition. I need scarcely say that I do so with great reluctance, but for the reasons that I indicated in *Hall v. Hall* (1), and have alluded to again to-day, I cannot act otherwise than on a strict interpretation of s. 3 of the Matrimonial Causes Act, 1937.

His Lordship intimated, in reply to counsel for the petitioner, that it was very desirable that everything should be done to have the matter tested in the Court of Appeal, and accordingly, as it was a poor person's case, certified that the petitioner should be furnished with the shorthand note of the proceedings.

Solicitors : *Simmons & Simmons ; The Official Solicitor.*

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Divorce—Wife's undefended petition—Desertion—Maintenance order—Inchoate non-cohabitation clause retained by error in form of order—No separation order made—Effect of mistake on deserting husband's mind—Rectification procedure—Petitioner's undisclosed adultery—Decree nisi rescinded.

Where a maintenance order was made in 1931 on behalf of a wife on the ground of the husband's desertion, but the magistrates did not make a separation order, the non-cohabitation clause, without adaptation of the wording to the circumstances of the case, was retained per incuriam in the printed form of order served on the husband. The President held on November 20, 1939, that it was not an effective non-cohabitation order and granted the wife a decree nisi on the ground of desertion.

The case came before the Court again on a motion by the King's Proctor for the rescission of the decree nisi on the ground of the petitioner's undisclosed adultery, and further information was forthcoming that the retention of the non-cohabitation clause was a clerical error.

In considering the observations made on *Cooper v. Cooper* in *Mackenzie v. Mackenzie*, ante, p. 81, by the Court of Appeal, the President said that in dealing with the matter in November, 1939, he was not concerned with the question whether the spouses had treated as ineffective a separation order that had actually been made, but the question was whether they, and in particular the husband, had recognized as an effective separation order an order which had not in fact been made at all. Neither party had treated the order as effective.

In such cases where a separation order has not been made but appears in the printed form of order per incuriam the safe course is to have the order rectified by the magistrates before the petition is filed, having regard to *Reg. v. Lanyon* (1872) 27 L. T. 355.

Decree nisi rescinded.

MOTION for rescission of decree nisi.

In an undefended suit for dissolution of marriage, Mrs. Edith Cooper, née Daniels, alleged that her husband, Mr. Sidney George Cooper, had deserted her without cause for a period of at least three years immediately preceding the presentation of the petition. The marriage took place in May, 1927, and in May, 1931, the Highgate magistrates granted the wife a maintenance order on the ground of her husband's desertion, together with the custody of the two children of the marriage. In the printed form of order served on the husband the non-cohabitation clause was left unerasd

by error. The adjudication by the magistrates in the Court minute book showed that the Bench had not in fact made a separation order. The President held (1) that the clause retained in the order did not make sense as it read: "And 'it is ordered that the applicant be no longer bound to 'cohabit with her husband, his wife, the defendant,'" that it was not an effective non-cohabitation order terminating desertion, and pronounced a decree nisi.

In view of the observations on this decision made by Slessor and Goddard L.J.J. in *Mackenzie v. Mackenzie* (2), after considering the report in the Times Law Reports (1) the President sent the papers to the King's Proctor for further inquiry as to the circumstances in which the non-cohabitation clause appeared in the order and as to the manner in which the order was treated by the parties. In the course of his inquiries the King's Proctor became aware that the wife petitioner had committed adultery but had not disclosed it to the Court, and now he moved the Court to rescind the decree nisi, the wife having taken no steps to ask for relief notwithstanding her adultery. The results of his inquiries on the points submitted to him by the President were placed before the Court.

Hobroyd Pearce for the King's Proctor.

1940. July 25. THE PRESIDENT (SIR BOYD MERRIMAN). This is an intervention by the King's Proctor in an undefended divorce case in which the wife was the petitioner, which came before me on November 20, 1939. On that occasion I pronounced a decree nisi on the ground of desertion. The case, so far as the origin of the desertion was concerned, appeared to be perfectly normal. The wife produced a finding of the Justices dated May 27, 1931, that her husband had unlawfully deserted her. She substantiated that by evidence before me, and proved that there had been no resumption of cohabitation, but of course she had to prove also that the desertion subsisted during the three years immediately preceding the presentation

(1) [1939] W. N. 402 ; 56 Times L. R. 1118.

(2) Ante, p. 81.

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of the petition, and the case had been put into the List on a day on which defended cases were being taken because of a difficulty which arose on the form of the Justices' order. On that order there appeared unerased these words: "It is adjudged that the complaint is true"—that is, the complaint of desertion—"and it is ordered that the applicant be no longer bound to cohabit with her husband, his wife, the defendant"; and then there was a further order about custody, and a further order about maintenance.

It is, of course, an elementary proposition that where the spouses are living apart under a separation order it is impossible to assert that desertion runs while that separation order is in force; and even if I had been unaware of that proposition, and of the authority upon which it is based, I should have been informed about it by Mr. Victor Russell in the opening sentence of his observations, when, having called my attention to the clause which I have just read, he said, "Of course, I am bound by *Harriman v. Harriman* (1), if it was properly put in, but my contention is it was put in entirely by mistake; the Court simply left it in the printed form."

The case was a difficult one, and I should imagine that from first to last, including the documentary evidence produced by the Assistant Clerk to the Justices, it took the best part of a morning. I have had the benefit of seeing a shorthand-note of what occurred. It is quite clear from the shorthand-note that the points about which I was in doubt, and about which I required evidence, were two: First, whether it was sufficiently proved that the justices had not made a separation order, and that this senseless phrase appeared in the formal order, as was asserted, merely by clerical error; and the second point was this: Even assuming that that were established, seeing that the order in its present form was shown to have been served upon the husband, whether it might not be said that his subsequent absence was justified by the form of the order.

I am going to take the last point first, because, as Mr. Holroyd Pearce has argued, there really is no doubt whatever on the face of the shorthand-note about that particular point.

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I should like to make one thing clear in passing. Although this was an undefended case it was taken on a day devoted to defended causes, and, with his customary frankness, Mr. Victor Russell put all his difficulties before me at the outset, and my findings were given *arguendo*. The wife herself gave evidence, putting it quite shortly, that she had always been anxious to have her husband back ; that he had gone to live with another woman ; that she had done her best to persuade, not only her husband to come back to her, but the other woman to give him up, and that this had gone on up to the very moment that she had felt bound to take proceedings in the police court. She never wanted anything but maintenance ; the last thing in the world she wanted was an order separating her from her husband. That was the wife's evidence.

Then the husband's mother proved that after the police court proceedings, though not directly with the wife's sanction, but because she knew that this was what the wife wanted, she went to the husband and told him it was his duty to come back to his wife, while the husband had said that he was quite content as he was, and he had no intention of making any change, or words to that effect ; and my conclusion upon that was expressed in this sentence, which appears on page 12 of the shorthand-note : " One thing which is quite certain is, "that it did not have any effect upon him"—that is, the service of the order did not have any effect upon him. Mr. Victor Russell assented, and from that moment that point was left, and we went on to discuss the question of whether an order had or had not been made.

Mr. Russell put in the forefront of his argument the senseless form of this particular clause, but he was not content only with that, because he called the assistant clerk to the justices. The assistant clerk had not been in Court—I am not sure that he was even employed at the Court—at the time when that particular judgment was made, and it was subsequently explained to me that the clerk who was in charge of the proceedings, or, rather, the then assistant clerk, was not available to give evidence for a reason which I need not specify, but which was conclusive. Consequently the Court

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was in the difficulty that the evidence about the question whether an order had or had not been made was not the best evidence ; but the assistant clerk produced the current minute book in use at that particular Court. At that time the system of holding separate matrimonial hearings had not been evolved, and consequently there were only a few matrimonial causes in the book. First of all, he produced the minutes of the particular order recording the evidence and the actual adjudication. The note of adjudication was as follows : " Adjudication : Desertion proved. Order made for "husband to pay wife *1l. 15s. and 5s. od.* for child. Costs two "guineas. Custody of child to wife. Payments to be made "through Collecting Officer."

In the report of this decision in the Weekly Notes (1), that aspect of the matter is fully brought out, and that adjudication is quoted in full ; but in the report in the Times Law Reports (2), to which I have been referred in the course of the argument, there is no detailed reference to that part of the case. Even so, although on the face of it it appeared as clear as could well be, taking this note of adjudication by itself, that no separation order had been made, having regard to the fact that Courts notoriously were not as strict in 1931 as they are to-day in the drawing up of orders, I adjourned the case in order that there might be an investigation of all the matrimonial cases in that book for the purposes of comparison ; and the result of that appears in the shorthand-note at page 10, when the clerk was re-called after having examined the book. The result, again, was to confirm the impression which the note of adjudication made, with this exception, that there was one case in which desertion had been proved, but the non-cohabitation clause had been left in ; and on the contrary there was another case in which the fact that a maintenance order only was being made was recorded. So that the matter was not absolutely conclusive.

There remained, however, the fact that in this particular case the wording of the supposed order was, as I have already said, senseless on the face of it. In those circumstances,

(1) [1939] W. N. 402.

(2) 56 Times L. R. 118.

having already disposed of the second question, whether the supposed order had had any effect on the husband, a final discussion took place between Mr. Russell and myself. He reiterated that his case was that the non-cohabitation clause was not intended to be in the order at all, and I said, "That is your real case, I think," to which Mr. Russell assented. Mr. Russell said that nobody was thinking about separation at all. Then I said this: "My only doubt is whether I ought to have the clerk here. It is very imperfectly proved, but I think really the whole point is, nobody was thinking about it at all." That is, nobody was thinking about a separation order at all. When I used the words "very imperfectly proved," both the immediate context and a passage which occurs on the following page make it clear that, being unaware at the time that the clerk was not available, I was referring to the fact that I had only had the evidence of a man who was speaking at second-hand, instead of the man who would have been able to speak at first-hand; in other words, I had had circumstantial instead of direct evidence as to whether an order had or had not been made.

Then I go on to say: "She did not want protection; she was not asking for protection, and nobody has treated it, from first to last, as being effective in any way, neither the husband nor the wife. Unfortunately it is found in its present form to be in the order, that is to say, not to have been erased, and as you point out, it does not make sense," to which Mr. Russell said, "No, my Lord," and I said: "I think on the whole it would be pedantic to treat this as an effective non-cohabitation clause."

Accordingly I pronounced a decree nisi, and there the matter would have ended but for the fact that a very short report on this case, in the Times Law Reports (1), was cited to the Court of Appeal in the case of *Mackenzie v. Mackenzie* (2), in a case in which an attempt had been made to get behind a separation order, apparently perfect on the face of it; and, Slessor L.J. says (3) this: "Mr. Scott Henderson agrees,

(1) 56 Times L. R. 118.

(3) Ante, p. 85.

(2) Ante, p. 81; 56 Times L. R. 300.

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“as I understand him, that the case of *Harriman v. Harriman* (1) would have been fatal to his appeal but for the decision of the learned President of the Probate, Divorce, and Admiralty Division in the case of *Cooper v. Cooper*. (2) The case is very summarily reported, but it appears that the wife had obtained from a Court of summary jurisdiction an order for maintenance on the ground that her husband had deserted her, but by inadvertence, as here, the non-cohabitation clause was not struck out. In that case the clause was not in a form which made it very intelligible, because, according to the report, it stated ‘that the applicant be no longer bound to cohabit with her husband his wife.’ The learned President treated the case, as I read the judgment, on the basis that it was to be read that the petitioner was no longer bound to cohabit with her husband. In that sense *Cooper v. Cooper* (2) was a case precisely like the present case. There as here those words were not struck out. The learned President said: ‘that the petitioner’s case was that the non-cohabitation clause was never intended to be in the order.’ So here. ‘The petitioner did not want protection, and was not asking for protection. From first to last, neither the husband nor the wife was treating the clause as effective in any way. Unfortunately, it was found to be in the order in its present form, that was to say, not to have been erased, and, as counsel had pointed out, the clause did not make sense.’”

“Eliminating that question, whether the clause made sense, the President went on to say that he thought ‘that it would be pedantic to treat it as an effective non-cohabitation clause.’ I think that is on the basis that it might make sense. But whether that is so or not, I am of opinion that if the learned President treated it as being a non-cohabitation clause which did make sense, and was to be read that the petitioner be no longer bound to cohabit with her husband, I think he was wrong in the conclusion to which he came. I think his conclusion is inconsistent with the decision of this Court in the case of *Harriman v. Harriman* (1) to ‘to which I have just referred.’”

(1) [1909] P. 123.

(2) [1939] W. N. 402.

Goddard L.J., on the same assumption says : " One difficulty " I have with regard to the case of *Cooper v. Cooper* (1) is that " there is nothing in the report to show on what the learned " President was founding when he said : ' From first to last " " neither the husband nor the wife was treating the clause " " as effective in any way.' I think that there must have been " some evidence before him to that effect ; but there is nothing " in the report to suggest what it was. Even if there had been " such evidence, I do not know how, so long as the order stood, " that non-cohabitation clause could be disregarded by the " Court in view of the decision in *Harriman v. Harriman*." (2)

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I do not understand, and Mr. Pearce has not been able to explain to me, how the assumption that the question of the clause making sense was to be eliminated came to be made. I assume it was because of the very abbreviated report in the Times Law Reports, but, even so, it appears on the face of it that that was one of the points upon which I relied. At any rate, I agree, with the greatest possible respect, that if I had decided that case on the ground that the parties, for some undefined reason, could treat as non-effective a separation order which had actually been made, it is a decision which could only be reached in ignorance of, or in defiance of, the decision in *Harriman v. Harriman*. (2)

I hope I have made it clear that that was not the decision at which I arrived, and that I was not concerned with the question whether the spouses had treated as ineffective a separation order that had actually been made, but the question whether they, and in particular whether the husband, had recognized as being an effective separation order an order which had not in fact been made at all.

Seeing that the decree absolute had not yet been made in this case, it seemed to me that a very awkward situation had arisen, because of those observations upon the decision which was made in *Mackenzie v. Mackenzie* (3) and I felt that it would be wrong, and indeed would be gravely lacking in respect to the Court of Appeal, to allow the matter, as it were,

(1) [1939] W. N. 402.

(3) Ante, p. 81.

(2) [1909] P. 123.

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to go by default, two members of the Court of Appeal having said it was one which could not be justified.

Accordingly, acting under s. 181, sub-s. 1, of the Judicature (Consolidation) Act, 1925, I referred the matter to the King's Proctor. I chose that course rather than the only other possible alternative of having the matter brought up specially on decree absolute in order to explain why, notwithstanding these observations, a decree absolute was being pronounced, because I was conscious that there was a grave element of doubt on the question whether the order had or had not been made, and I thought that the proper course was to invoke the assistance of the King's Proctor both on the point of fact and on any question of law which might arise from it. It was obvious that the result of such investigation might be on the one hand that it would be shown conclusively that a separation order had indeed been made, in which case, of course, the King's Proctor would have considered whether on the new facts an intervention would be justified in order that the decree might be rescinded on the ground that new material had been put before the Court, or it might show on the contrary that the order had not in fact been made.

I acknowledge with gratitude that the most thorough investigation has been made on this rather difficult point, but having regard to what has subsequently happened, it is not necessary for me to go into it in detail. Suffice it to say, that the ex-clerk, who was actually concerned with the proceedings, has been seen, and he has assured the King's Proctor that he was satisfied the clause in its present form was nothing but a clerical error. The present clerk has also expressed his own view that a separation order was not in fact made, and that the clause in its present form is in the order by clerical error; and that is the considered view of the matter which Mr. Pearce, on behalf of the King's Proctor, has put before me. I ought to say that it has been reinforced by a minute examination of current orders. I need not go into the details, and there is still some little doubt in so far as the matter depends upon the circumstantial evidence and not upon the former clerk's statement; but taking one thing with

another, Mr. Pearce has told me he is instructed to say that the King's Proctor is satisfied that a separation order was not made, and that the clause as it now appears is in the order merely by clerical error.

I need only say this, therefore, that if the matter had rested there, with this further information, I should not have felt bound by the expressions to which I have referred in *Mackenzie v. Mackenzie* (1) in the Court of Appeal to rescind this decree, because they seem to me to be based upon a misapprehension as to what had been decided in this case; and Mr. Pearce intimated quite plainly that the King's Proctor would not have invited me to take any other view. Mr. Pearce has shown me, I think conclusively, having regard to the decision in *Reg. v. Lanyon* (2), that the safe course in such cases where there is any doubt about the matter is to get the order rectified, as he suggests (and I think rightly) at any time before bringing the case into Court, or perhaps it would be safer to say at any time before the petition is filed.

But where, as here, the order, or supposed order, is senseless on the face of it, Mr. Pearce does not put forward the view that such a rectification is necessary. He suggested that the onus of saying that there was an effective separation order in such circumstances lay upon anybody who was prepared to assert it. I am not quite sure about that. I incline to the view that the way in which it was approached at the former hearing was right, and that it was for the petitioner to prove the whole of her case, including the absence of any separation order, and that the onus rested upon her; but whichever way the onus lies, Mr. Pearce does not seek to argue that, where a clause is senseless and one is satisfied that it is there merely by clerical error, it affords any bar to an assertion of desertion.

I cannot help thinking that the matter can be quite simply tested in this way, by assuming that the order in its present senseless form had been drawn up after justices had said in open Court that they were not making a separation order, and it had been shown by plain and unequivocal evidence that, expressly upon that basis, discussions about the

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(1) Ante, p. 81.

(2) 27 L. T. 355.

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resumption of cohabitation had taken place between the parties afterwards. In such circumstances it seems to me that it would be not merely pedantic, but utterly absurd, years afterwards, when a divorce petition is presented, or is about to be presented, and a clause of this character is found in the order, to treat it as a bar to desertion which was found to be proved at the time and has been running ever since. At any rate, if that is to be held, it must be held by some other tribunal. There is nothing in the decision of the Court of Appeal in *Mackenzie v. Mackenzie* (1) or their comments on this case, which would have bound me to hold that, if that had been the remaining issue in this suit.

But, in the course of the King's Proctor's investigations, it was discovered that the petitioner herself had been living in adultery, which she had not disclosed, for a very long time. On this discovery, the King's Proctor obtained instructions to intervene, and has intervened on that ground, and on that ground only. There has been no answer by the petitioner, and she has not sought to put herself right before the Court by admitting the adultery and praying that nevertheless the discretion of the Court might be exercised in her favour. It has been made clear from the correspondence to which I have been referred that her abstention from this stage of the proceedings is deliberate. In those circumstances, there is no alternative but to accede to the King's Proctor's plea and to rescind this decree, and dismiss the petition.

Solicitors: *The King's Proctor.*

(1) Ante, p. 81.

W. L.

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July 22.

Prize Court—Practice—Absence of claim—Right to condemn on lapse of time—Six months rule—Order xv., r. 9, of Prize Court Rules, 1939—General usage of nations.

By Order xv., r. 9, of the Prize Court Rules, 1939, "No ship or aircraft shall be condemned at the hearing in the absence of an appearance or claim until six months have elapsed from the service of the writ . . . unless there be on the ship papers or aircraft papers, and on the evidence, if any, of the witnesses from the captured ship or aircraft, sufficient proof that such ship or aircraft belongs to the enemy, or is otherwise liable to condemnation."

By Order i., r. 2, "Unless the contrary intention appears, the provisions of these Rules relative to ships and aircraft shall extend and apply mutatis mutandis, to goods . . ."

It is a well established principle of prize law that the onus of proof does not lie upon the Crown but upon the claimant, and there are authorities which lay down that by the general usage of nations, after the lapse of a year and a day enemy ownership may be presumed if no other claimant comes forward to establish a claim.

Sed quare, whether this presumption can be applied in all its implications to other grounds of condemnation; whether Order xv., r. 9—a municipal rule of procedure—can substitute a period of six months for the period recognised by the usage of nations; and whether there is any doctrine which makes condemnation necessary merely on evidence of seizure and absence of claim for over six months.

Decisions of Sir Samuel Evans in *The Antilla* (1918) 7 Ll. P. C. 402, 408, and other cases, and of Lord Sterndale in *The Frogner* (1919) 8 Ll. P. C. 382, 388, contrasted and commented on.

FIVE SUITS, tried together for the condemnation as prize of part cargoes shipped from South American ports "to order" Hamburg or "Rotterdam and/or Hamburg" in Dutch and Norwegian vessels, and seized after the outbreak of war on the ground that the goods were as to part absolute contraband and, as to the remainder, conditional contraband.

The case is only reported upon an alleged rule that solely by virtue of Order xv., r. 9, of the Prize Court Rules, in the absence of a claim, after the lapse of six months the Crown is entitled to a decree of condemnation.

Sir Donald Somervell K.C., A.-G. and J. V. Nesbitt for the Procurator-General on behalf of the Crown. Seizure in prize

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is prima facie evidence that the goods are confiscable, and it is a well established rule that it is for claimants to prove that the goods should not be condemned. In Pratt's edition of Story on Prize (1854) it is stated (p. 21) "Where no claim is interposed it is not now usual to condemn the goods for want of a claim until a year and a day have elapsed from the time of the return of the monition, except in cases where there is a strong presumption and reasonable proof that the property actually belongs to an enemy. But after a year and a day have elapsed condemnation goes of course if there be no claim interposed." See also *The Harrison*. (1) Order xv., r. 9, of the Prize Court Rules, 1939, which is in the same terms as Order xv., r. 7, of the Rules of 1914, has clearly substituted six months for the former period of a year and a day. There are a number of cases decided during the last war which show that in the view of the Court, if six months have elapsed, in the absence of a claim the Crown has the right to ask for condemnation. In *The Belgia* (2) Sir Samuel Evans said: "This is one of those cases which 'could be simply dealt with under the six months' rule, the capture having taken place over a year ago, and 'there being now no claim before the Court': see also *The Antares* (3), *The Sydland and Indianic* (4) and *The Antilla*. (5) In *The Sorfareren* (6) his Lordship said: "no claim having been made by the true owners within six months of the capture the goods are subject to condemnation according to the Prize Rules": see also *The Toronto* (7) and *The Glenroy* (8), and there are other cases to the same effect.

In *The Frogner* (9), where Lord Sterndale did not apply the six months' rule the evidence filed by the Crown in itself showed that the goods were not subject to condemnation as

(1) (1816) 1 Wheaton, 298.

(2) Unreported. 7 Oct., 1915.

Printed for the Treasury
Solicitor's Department from
the official shorthand notes.

(3) (1915) 1 B. & C. P. C. 261, 271.

(4) (1916) 2 B. & C. P. C. 510n.

(5) (1918) 7 Ll. P. C. 402, 408.

(6) (1915) 1 B. & C. P. C. 589, 602,
603.

(7) Unreported. 6 Feb., 1918.
Printed for the Treasury
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the official shorthand notes.

(8) (1918) 7 Ll. P. C. 200, 206.

(9) (1919) 8 Ll. P. C. 382, 388.

contraband ; and the Crown does not contend that if on the face of the papers it appears to the Court that the goods are not condemnable the default rule should apply. If the matter is left in doubt, in the absence of a claim the Court should condemn, but if the Court has no doubt that the goods in question are not liable to condemnation then it will not condemn them. The rule is not intended to withhold evidence from the Court. In the present case the Crown would not have been justified in coming to Court without filing evidence that such a commodity as, for example, horse hair, is absolute contraband on account of the use to which it can be put.

[THE PRESIDENT. Is there any evidence that other countries during the last war accepted as authoritative this reduction in the period to six months ?]

The Procurator-General has no information on the point, but it is to be observed that in the Japanese Prize Court, if a claimant did not enter an appearance within thirty days he was not allowed to enter an appearance at all : see *The Lesnik* (1) and *The Hsiping*. (2) If the Court thinks, however, that the period should be a year and a day, so be it.

[Reference was also made to Colombos' Law of Prize, pp. 304-307.]

1940. July 22. THE PRESIDENT (SIR BOYD MERRIMAN) : In this case the Crown seeks condemnation of parts of the cargo of five ships, the *Alwaki*, the *Alpherat*, the *Westland*, the *Helder* and the *Inger Elisabeth*, the first four being Dutch and the last a Norwegian ship. The shipments in all cases were made before the outbreak of war, and the cargoes which I am invited to condemn comprise at one end of the scale obvious contraband such as manganese ore, and at the other end of the scale such things as animal hair, weasands, peas and beans.

With regard to the items which are said to be absolute contraband, I have had in each case an affidavit by a witness of authority explaining to me the use to which the goods alleged to be absolute contraband can be put in the terms of the Proclamation. I am not going to read those affidavits in

(1) (1904) 2 Russ. & Jap. P. C. 92. (2) (1904) 2 Russ. & Jap. P. C. 135.

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detail ; I propose to content myself by saying that in every case the evidence satisfies me that the goods are within the first part of the schedule to the Proclamation and are absolute contraband.

[His Lordship then detailed the goods, and said that with regard to all of them except a consignment of manganese ore he would certainly have been unable to come to the conclusion of his own knowledge that they were absolute contraband, uninformed by the very clear affidavits which had been put before him. He mentioned that because he thought it was of importance in connection with an argument which the Attorney-General had addressed to him and with which he would deal separately.

With regard to the rest of the cargoes which consisted of foodstuffs all of which were said to be conditional contraband, there was the clearest possible evidence of German Decrees which imposed Government control on all these articles and prescribed that they were automatically seized at the moment of coming into the customs house.

He had no doubt at all, therefore, on the authority of Lord Parker's judgment in *The Hakan* (1), on the evidence before him that all these goods were condemnable as good and lawful prize, and he so decided.]

His Lordship continued as follows : But the Attorney-General has asked me to go further and to say that, it being the case that the writs in respect of all these cargoes were issued more than six months ago and there being no claim in respect of any of them—or, it would be more accurate to say, there being now no claim in respect of any of them, because in respect of one case a claim was tentatively put forward and then withdrawn—the Court is entitled to condemn after the lapse of six months by virtue of Order xv., r. 9, which reads as follows : “ No ship or aircraft shall be condemned at the “hearing in the absence of an appearance or claim until six “months have elapsed from the service of the writ, which shall “be verified by an affidavit of service unless there be on the “ship papers or aircraft papers, and on the evidence, if any,

"of the witnesses from the captured ship or aircraft, sufficient
 "proof that such ship or aircraft belongs to the enemy, or
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Now there is no doubt that under the law of nations, as it is described in the American case, *The Harrison* (1) enemy ownership, at any rate, might be presumed after the lapse of a year and a day if no other claimant came forward. The Attorney-General is on sure ground when he invokes the principle that in prize cases the onus is upon the claimant to put forward and establish a claim; it is not for the Crown, as a matter of pleading, to plead and particularize an affirmative case: the capture may be presumed to be in order until some claimant comes forward and establishes his claim. Undoubtedly there are passages in Pratt's edition of Story which emphasize the presumption that after the lapse of a year and a day enemy ownership may be presumed. I am quoting from the judgment of Story J. in *The Harrison* (1); "Whenever
 "a prize is brought to adjudication in the Admiralty, if, upon
 "the hearing of the cause upon the ship's papers, and the
 "evidence taken in preparatory, the property appears to
 "belong to enemies, it is immediately condemned. If its
 "national character appear doubtful, or even neutral, and no
 "claim is interposed, the Court do not proceed to a final
 "decree, but the cause is postponed, with a view to enable any
 "person, having title, to assert it, within a reasonable time,
 "before the Court. This reasonable time has been, by the
 "general usage of nations, fixed to a year and a day after the
 "institution of the prize proceedings; and if no claim be
 "interposed within that period, the property is deemed to be
 "abandoned, and is condemned to the captors for contumacy
 "and default of the supposed owner."

Now it is quite clear, in that judgment, that the whole stress is upon the ownership of the property. It will be remembered that the rule which I have read deals with the sufficiency of proof either that such ship or aircraft belongs to the enemy or that it is otherwise liable to condemnation. I think it is well, without going into too much detail about this, to remember that these

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citations from Story J. and from the well known letter which is quoted in Pratt's edition of Story's Law of Prize, were all pronounced and written at a time before even such complications as were introduced into prize law by the Declaration of Paris had come into existence, and still more so before some of the more difficult problems which arose during the last war. While it is very easy to see how this presumption can be applied without difficulty in the case of the mere question of ownership, it is, as the argument seems to me to have shown, a little more difficult to apply it in all its implications to other grounds of condemnation. However that may be, I am not to be taken to be throwing any doubt whatever upon the full extent of the rule, whatever it was, which enabled the Crown to ask for condemnation, under what Story J. calls the general usage of nations, after a year and a day. But I am asked to say that for that period of a year and a day there has been substituted a period of six months by virtue of Order xv., r. 9. I doubt whether it is possible, by what is merely a municipal rule of procedure, to substitute for a period recognized by the usage of nations some period which depends solely upon such a rule, and I have asked in vain for anything which suggests that other countries during the last war accepted as authoritative this reduction in the period. However, the Attorney-General has satisfied me that, at first I think coupling it with a pronouncement that there was ample positive evidence in the particular case, but later relying solely on the rule, Sir Samuel Evans did treat the rule as being of itself sufficient ground for condemnation in the absence of a claim within the six months. I think probably the clearest expression which justifies that contention, but it is not the only one, is in *The Antilla* (1), where Sir Samuel said this: "As the Crown asks me to do so, and is I think within its legal rights there being no claimants before the Court, and six months having elapsed since the writ, I condemn these goods as good and lawful prize in accordance with Order xv., r. 7." That was in terms identical with the wording of the present rule.

Now if the matter had stood there, though I might have felt a little doubt about it, I should have felt obliged to follow it. I think it would be an unfortunate result, because, as far as I can see, it would mean that the Crown would be obliged to do nothing more than this, to put before the Court, the writ, the affidavit of service and of ship's papers, and no other evidence of any kind whatever.

But the matter is not really left there. In *The Frogner* (1) to which the Attorney-General called my attention, there occurs in the judgment of Lord Sterndale this passage: "Does infection, as it is called, affect the 800 tierces by reason of their being the property, at the date of seizure, of the same person as the 200 tierces? That depends upon whether the 200 tierces"—that is one-fifth of the cargo—"are contraband or not. It does not follow, in my opinion, because there is no claimant to the goods that therefore they must be condemned. One of the Prize Court Rules (Order xv., r. 7) provides that goods cannot be condemned for want of an appearance unless six months have elapsed. No doubt that suggests, by way of implication, that they may be condemned if six months have elapsed, but I do not know that there is any doctrine which makes condemnation necessary, if nothing else has occurred except seizure and want of claim for over six months. If there are other facts which emerge in the case, it does not seem to me that the Court is obliged to find that the goods were contraband, and to condemn them."

In putting forward his submission upon the so called "six months' rule" the Attorney-General suggested this qualification. He said that supposing the evidence showed affirmatively that the goods were not contraband, he would not suggest that the default rule should apply; but that in other cases the rule justifies condemnation although if the onus were, as it is not, on the Crown, there might be an element of doubt. Now, I have said already that I throw no doubt whatever upon the well established principle that the onus of proof does not lie upon the Crown but upon the claimant.

{1} 8 Ll. P. C. 382, 388.

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It is upon the first part of that suggested qualification that my difficulty arises. As I have said, the application of a default rule seems to me to be perfectly simple where one is merely dealing with the question of ownership, but it is in connection with the class of case with which I am dealing that it seems to me the difficulty arises. Take, for example, one of the items (and there are several to which this applies) which I have been asked to condemn, and am prepared to condemn, as absolute contraband, namely seven bales of cattle tail hair. If this rule applies, all that would be necessary, as I see it, is to show that seven bales of cattle tail hair were the subject of a writ, that that writ was served and that there has been no claim within six months, I see no room for the qualification as to whether the evidence showed affirmatively that the goods were not contraband. It may very well be that the documents in the ship's papers would show affirmatively that the goods were not such that they could be contraband—that is one thing—but there could be, and there need be, no evidence about the nature of the goods themselves. They would remain what they appear to be, seven bales of cattle tail hair. Either it is necessary to produce evidence to show that these goods are contraband, because of their applicability or suitability to one or other of the uses in the Proclamation, or it is not. If this "six months' "rule" applies, and is of universal application, I cannot myself see what room there is for evidence about the matter at all. Putting it the other way round, if evidence is required, then it seems to me that the six months' rule cannot be an absolute rule.

With regard to this case I can only repeat what I have said, that there were several parcels here which, unenlightened, I should never have dreamed were absolute contraband but which on the evidence I am convinced are such. I propose to decide this case upon the evidence, and it may be that a day will come when I shall have to decide, or somebody else will have to decide, whether the pronouncements of Sir Samuel Evans on this matter which suggest that there is an absolute rule, or the observations of Lord Sterndale which I have quoted, which appear to show there is no such absolute rule,

are right. If I were to decide it in this case, my decision would be worth nothing because it would be obiter. I have decided the case on other grounds. I can myself see no half way house between the pronouncement that there is an absolute rule entitling the Crown to ask for condemnation, and the judgment of Lord Sterndale, which must have been given after argument, because the Attorney-General appeared in the case, and Sir Samuel Evans had made these various pronouncements long before his judgment was given. Sooner or later it may be necessary to resolve this doubt. I propose to say no more about it in this case except that I am not convinced that Lord Sterndale's judgment was wrong.

The cargoes or their proceeds will be condemned.

Solicitor for the Procurator-General: *The Treasury Solicitor.*

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Divorce—Decree nisi on wife's petition—Presumption of husband's death—King's Proctor's plea—Husband still alive—Court's power to rescind decree—Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), s. 8—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 183, sub-s. 2.

Where, after a decree nisi has been pronounced for dissolution of marriage, coupled with a declaration of death of the respondent spouse, under s. 8 of the Matrimonial Causes Act, 1937, the respondent is found to be alive, on an intervention under s. 183, sub-s. 2, of the Judicature (Consolidation) Act, 1925, the Court will rescind the decree nisi and dismiss the petition.

INTERVENTION by the King's Proctor after decree nisi of divorce and declaration of presumption of death.

The parties were married at Maidstone on August 26, 1922. The parties entered into a separation agreement dated November 19, 1929. The wife filed a petition for divorce on the ground of desertion on June 24, 1938. There was no answer, the husband's whereabouts being unknown. Hodson J. was not satisfied at the hearing on June 27, 1939, that there had been desertion, and the suit was adjourned and later the petition was amended by inserting an allegation that the husband should be presumed to be dead, in pursuance of s. 8 of the Matrimonial Causes Act, 1937. (1) A decree nisi of divorce on that ground, coupled with a declaration of

(1) 1 Edw. 8 and 1 Geo. 6, c. 57, s. 8, provides: (1.) "Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the Court to have it presumed that the other party is dead and to have the marriage dissolved, and the Court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage." (2.) "In any such proceedings the fact that for a period of seven

"years and upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved." (3.) "Sects. 181 to 184 inclusive of the principal Act shall apply to a petition and a decree under this section as they apply to a petition for divorce and a decree of divorce respectively."

presumption of the respondent's death, was pronounced on October 4, 1939.

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The King's Proctor filed his plea in January, 1940, to show cause why the decree should not be made absolute on the ground that the material fact had not been brought to the notice of the Court that the husband was in fact alive. It was contended on behalf of the petitioner that on a true interpretation of s. 8, sub-s. 2, of the Act of 1937, she was still entitled to her decree, notwithstanding that her husband was still alive. At the hearing of the King's Proctor's plea the husband was in Court.

The material facts and the argument are contained in the judgment.

P. R. Hollins (for *S. E. Karminski*, on war service) for the King's Proctor.

W. R. K. Merrylees for the petitioner.

1940. Aug. 30. LANGTON J. This intervention by the King's Proctor raises an interesting and important point under s. 8 of the Matrimonial Causes Act, 1937. The facts out of which the intervention arises are not in dispute. The parties were married on August 26, 1922. On June 27, 1939, Mrs. Manser, having presented a petition for divorce against her husband on the ground of desertion, was refused a decree by Hodson J. because the parting between the spouses took place upon the terms of a deed of separation and therefore by mutual consent. The learned judge, however, granted an adjournment in the matter in order to allow Mrs. Manser an opportunity to consider whether there was not some other ground upon which her petition could be based. On July 11, 1939, Mrs. Manser presented an amended petition containing these allegations: "7. That the Petitioner last lived and "cohabited with the said Charles Herbert Manser at 57, "Buller Road, Brighton, aforesaid and that on a Friday "during the month of August, 1929, the said Charles Herbert "Manser contrary to the wishes of the Petitioner left her and "has never since resumed cohabitation with her. 8. That the "Petitioner last saw the said Charles Herbert Manser during

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"the month of August or September, 1930, in the street at Brighton in the County of Sussex and that the said Charles Herbert Manser was last heard of by the Petitioner during the month of March or April, 1931, but that his address at that time was unknown to the Petitioner." On the basis of these fresh allegations, which were duly proved in evidence, Hodson J. granted Mrs. Manser a decree nisi on the grounds set forth in s. 8 of the Matrimonial Causes Act, 1937.

The King's Proctor filed his plea on January 26, 1940, alleging "that the decree was obtained contrary to the justice of the case by reason of the following material fact not having been brought to the notice of the Court, namely, that on the 4th day of October, 1939, the Respondent was alive." The respondent, Charles Herbert Manser, was in Court at the hearing before me and ready to go into the witness box if required to do so.

The point which arises for decision is: whether the fact that the respondent, Mr. Manser, has been proved to have been alive at the time when the decree nisi was granted and to be still alive now affords good cause for rescinding the decree nisi.

Mr. Hollins, who appeared for the King's Proctor, made some complaint as to the conduct of the petitioner, in that although she had employed the services of a private detective in order to discover her husband's whereabouts, she had omitted one accessible and obvious road of enquiry which, when followed by the King's Proctor, had led to the immediate discovery of Mr. Manser. I asked, therefore, whether it was any part of the King's Proctor's case against Mrs. Manser that her enquiry as to her husband's whereabouts was either not bona fide or culpably casual. Mr. Hollins told me quite frankly that this point was raised upon a question of costs only, and that the King's Proctor did not desire to make any kind of imputation against Mrs. Manser. To put the matter concisely, the case and the only case put forward on behalf of the King's Proctor was that the Court cannot allow proceedings based upon presumption of death to continue when the individual whose death has been presumed is proved to be alive.

For the petitioner it was argued by Mr. Merrylees that the fact that the respondent was now proved to be alive and to have been alive on October 4, 1939, was a matter of no significance in these proceedings. Sect. 8 of the Act did not deal with the question of the life or death of the respondent, but only with the grounds set out in the section which would justify a decree nisi being granted. Thus, according to the first sub-section, the Court has only to satisfy itself that reasonable grounds exist upon which the petitioning spouse may suppose that the other spouse is dead; and if the Court is satisfied that reasonable grounds exist, a decree of presumption of death may be made. Similarly, for the purposes of the second sub-section, where a period of seven years or upwards has elapsed during which the respondent has been continually absent from the petitioner, and the petitioner has no reason to believe that the respondent has been living within that time, these two facts shall be evidence that the respondent is dead until the contrary is proved.

As regards this second sub-section Mr. Merrylees argued that the final words did not permit of the contrary being proved after decree nisi, because the object in view was not to establish whether in point of fact the respondent was dead or alive, but whether on the day upon which the evidence was taken, the facts, so far as then known, were such as to justify the Court in taking action upon the grounds set out in the sub-section.

In reply to this argument Mr. Hollins pointed to the third sub-section of s. 8, whereby a fasciculus of sections included in the principal Act of 1925 are expressly retained in their application to this section. These clauses are precisely those which provide in terms for interventions by the King's Proctor or by a member of the public, and form an awkward obstacle to the petitioner in the present case.

[His Lordship recited the terms of s. 183, sub-s. 2, of the principal Act and continued:]

In answer to the point that the King's Proctor was in the present instance bringing forward the material fact that Mr. Manser was alive, which had not been brought before the

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Court when the decree nisi was granted, Mr. Merrylees contended, first, that the fact was not material, and secondly, that in the present context material facts should be construed as ejusdem generis with collusion. The first of these points which is, of course, a restatement of his original contention, merits most careful consideration, but the second seems to me to possess more than one defect.

To deal with the second point first, the ejusdem generis rule of construction depends, as I have always understood it, upon the existence of certain general words which can be said to define and limit the application of other more particular terms employed in the same context. For my own part I have known it hitherto as a rule for the construction of documents rather than of statutes, and in endeavouring to apply it to the present section I should be at a loss to imagine a genus which embraces both collusion, which connotes intention, and material facts, which, as in the present case, are innocently withheld, thus excluding intention. Again, testing the matter by experience, the material facts which are constantly brought to the notice of the Court in this connection have no relation at all to the subject of collusion and could not by any stretch of imagination be generically so connected. I cannot believe that this point is a sound one.

Turning then to the first and more substantial point. The only case which was cited to me as a reported decision upon this section of the Act was a decision of Bucknill J. in the case of *Parkinson v. Parkinson*. (1) Neither counsel, however, claimed that the judgment in that case was addressed to the particular point that is here raised. In so far as it is an authority for the proposition stated in the headnote, that absence under a deed of separation does not debar the petitioner from claiming the advantage given by sub-s. 2, I gladly follow this authority, but otherwise the case is not in point. The substance of Mr. Merrylees' contention, as I understand it, is that sub-s. 2 must in no circumstances be read as if there were a comma between the words "dead" and "until." That is to say that the last six words of the

(1) [1939] P. 346.

sub-section "dead until the contrary is proved" must be read together; and thus the facts set out in the preceding words of the sub-section are to be treated as constituting the evidence necessary for a decree. Read in this fashion, the term during which the contrary may be proved is limited to the time before the decree nisi is granted.

Treating the matter first from the point of view of first impressions, I must own that this construction of the sub-section strikes me as slightly artificial; but it is certainly not impossible, and acquires some attraction when one commences to speculate upon the possible objects of the framers of the Act. When, however, one enters seriously upon this latter line of thought the pointed inclusion of the sections preserving the King's Proctor's duties gains additional weight and force. Read naturally and simply it appears to me that full value can be given to every word in the section if it be taken to allow the Court to act upon the facts set out in sub-ss. 1 and 2 respectively to the extent of granting a decree nisi upon proof of either of these sets of facts, but at the same time to reserve and preserve in sub-s. 3 a right to recall such decree if material facts come to light within the prescribed period which contradict or destroy the facts or presumptions upon which the decree was granted.

Further, in weighing this point it seems to me material to consider the nature and function of the decree nisi. In a much discussed case of breach of promise of marriage, *Fender v. St. John-Mildmay* (1), the nature of the decree nisi was considered and explained. There was a deep divergence of opinion amongst the learned Lords who heard this case upon the specific question at issue; but I do not find so great a difference between them upon what was there a subordinate question—namely, the nature of a decree nisi. Lord Russell of Killowen, in his dissenting opinion, sums the matter up in the following language (2): "The decree nisi, as I understand it, effects nothing. It does not dissolve the marriage. The parties are just as much man and wife as they were before. It is true that the right to consortium

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(1) [1938] A. C. 1.

(2) *Ibid.* 28.

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"could not be enforced; that duty or obligation between spouses is no doubt in suspense. So it is once a petition for divorce has been presented. Other duties or obligations, however, remain. The duty or obligation to refrain from sexual intercourse with others surely continues. To break it would be to commit adultery, just as much as to marry another would be to commit bigamy."

Lord Atkin, delivering the leading opinion of the majority, points out (1) that the normal obligations and conditions of marriage in ordinary circumstances disappear after decree nisi, but he accepts as matter of course Lord Russell's propositions concerning the continuance of status, and as to obligations in restraint of intercourse until the marriage is dissolved by decree absolute. Finally Lord Roche, who was also a dissident to the main decision, says (2): "The decree nisi operates only in the future and when the Court sees fit to make it absolute, and I need not repeat what has been truly said by my noble and learned friend Lord Russell of Killowen as to the continued subsistence of the marriage status of the parties to the marriage after a decree nisi and as to the bearing of that fact upon the questions of adultery and of reconciliation."

These weighty expressions of opinion, though not directly in point to the issue which here falls to be considered, bring into sharp relief the inchoate, temporary and provisional character of a decree nisi in divorce matters. They do nothing to assist the contention that where circumstances which, as presented in the first instance, have justified the granting of a decree nisi, can be shown before a decree absolute is granted to have been presented incompletely or in error, the decree nisi cannot be recalled.

If one turns from this indirect guidance to the language of the actual decree in this present case it reads as follows: "The Judge . . . decreed that the marriage . . . be dissolved by reason that since the celebration thereof the Court has presumed the death of the said Respondent Charles Herbert Manser unless sufficient cause be shown to the Court why this Decree should not be made absolute

(1) [1938] A. C. 16.

(2) Ibid. 53.

"within six months from the making thereof." There is nothing in this language to suggest irrevocability: there is at least something to preserve time and opportunity for reconsideration.

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One is accordingly driven back to a consideration of whether the fact that Charles Herbert Manser is alive, is or is not a sufficient cause why the decree should not be made absolute. If it be right to consider that the decree nisi is, as its name and form suggests, a provisional order only, and one which by express reservation of words contained therein will not operate in certain events, it seems difficult to my mind to imagine a fact more material, or an event more compelling to the whole circumstances of this case than the fact that Mr. Manser is alive. If, of course, the plain language and clear intention of the statute inevitably leads one to the conclusion that so stubborn and corporeal a fact ought to be ignored, it would be the duty of the Court to close its eyes to the existence of Mr. Manser. To my mind, for the reasons I have given, I think that the language of the Act points in the opposite direction.

In the present instance I am not without sympathy for Mrs. Manser, who appears to have been to all intents and purposes deserted by her husband, although debarred from setting up that desertion as a ground for the dissolution of her marriage. Apart, however, from what I may call the private merits of the particular case, I cannot feel sorry that the language of this statute does not appear to drive me to the extremity of allowing these proceedings to continue upon the footing of the presumption of death of an individual who is admittedly alive. To my thinking the paradox involved would be preposterous, and the absurdity both patent and grotesque.

His Lordship rescinded the decree nisi and dismissed the petition.

Solicitors: *The King's Proctor; Smith, Rundell, Dods and Bockett, for W. W. Pearson, Chatham.*

W. L.

END OF VOL. AND OF PROBATE SERIES FOR 1940.

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